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December 10, 1954	Notice of Appeal filed by attorney for plaintiff.
" 10 "	Bond for Costs on Appeal filed ($250.00).
" 13 "	Copy of Notice of Appeal mailed Clerk, U. S. Court of Appeals, copies of notice mailed to counsel of record.
" 15 "	Petition of Gilbert S. Parnell for extension of time filed; Order entered granting petition and directing file papers and transcript of testimony in the case be retained in possession of the Clerk until January 30, 1955 for the purpose of giving the defendant ample opportunity to prepare the argument in the notice of appeal filed Dec. 10, 1954 on the part of the plaintiff. Consented to by counsel for plaintiff; Counsel for 1st National Bank of Indiana.
" 20 "	Order of Court entered directing time for transmitting the record on appeal be, and it hereby is extended to Jan. 30, 1955 and that the time for docketing the appeal and filing record be, and it hereby is extended to February 10, 1955. The Order of December 15 is hereby rescinded.
January 28, 1955	Original record mailed Clerk, U. S. Court of Appeals, together with exhibits.

Docket Entries.

February	15, 1951	Complaint filed. Jury Trial demanded by plaintiff.
"	" "	Summons issued.
"	21, "	Praecipe for appearance of Frank Harrison, Esq., of Squire, Saunders & Dempsey, Esqs., 1857 Union Commerce Bldg., Cleveland, O., for Federal Reserve Bank of Cleveland, filed.
"	" "	Praecipe for appearance of Harvey A. Miller, Jr., for First National Bank in Indiana, filed.
March	2, "	Praecipe for appearance of James P. McArdle for Gilbert S. Parnell, defendant, filed.
"	6, "	Summons returned served with copy of complaint on A. G. Foster, Cashier for Federal Reserve Bank of Cleveland, at 717 Grant St. Pgh. Pa. on Feb. 16, 1951, and on P. J. Straitiff, Cashier for First National Bank in Indiana at Philadelphia St. Indiana Pa. on Feb. 16, 1951; on Gilbert S. Parnell, personally at 640 Philadelphia St. Indiana Pa. on Feb. 16, 1951; on Mrs. Arthur A. Rocco for Arthur A. Rocco, at Apt. #11-5542 Jackson St. Pgh. Pa. on March 1, 1951.
"	" "	Answer of First National Bank in Indiana filed.
"	" "	Answer of Gilbert S. Parnell, defendant, filed. Acceptance of service of copy thereon.

March	8, 1951	Answer of Federal Reserve Bank of Cleveland filed.
"	12, "	Acceptance of Service of copy of Answer of Federal Reserve Bank of Cleveland, filed.
"	21, "	Praecipe for appearance of Margiotti & Casey, Esqs., for defendant Arthur A. Rocco filed.
"	" "	Answer of Arthur A. Rocco defendant to the Complaint filed.
"	26, "	Proof of Notice with request for Admissions filed by First National Bank of Indiana.
April	5, "	Motion to extend and enlarge time for filing answer filed; Acceptance of service of copy; Order allowing time be extended to May 5, 1951.
May	2, 1951	Plaintiff's Answer to Request for Admissions of Defendant First National Bank in Indiana filed. Service accepted thereon.
Nov.	15, "	Requests by Federal Reserve Bank of Cleveland to plaintiff for admissions and answers to Interrogatories, filed.
"	19, "	Acceptance of service filed by plaintiff.
"	26, "	Motion of plaintiff to extend and enlarge the time for filing objections or answers to the Interrogatories and the request for admissions of defendant Federal Reserve Bank of Cleveland filed; Order entered extending time to December 26, 1951 for above actions.

December	20, 1951	Motion, consent, acceptance of service filed and Order entered directing that time within which plaintiff may file Interrogatories and Request for Admissions of defendant Federal Reserve Bank of Cleveland, be and hereby it is extended and enlarged to January 15, 1952.
January	9, 1952	Plaintiff's Answers to Request of Federal Reserve Bank of Cleveland to Answer Interrogatories and admit facts filed; Acceptance of service thereon.
January	9, 1952	Objections to plaintiff Bank of America National Trust and Savings Association to Request of defendant Federal Reserve Bank of Cleveland to answer Interrogatories and admit facts, filed.
"	14, "	Praecipe for Jury List filed by plaintiff.
May	22, "	Motions of defendant to compel plaintiff to answer Interrogatories, memorandum in support thereof and in reply to plaintiff's objections to answering certain interrogatories filed. Acceptance of service thereon.
May	28, "	Hearing before Gourley, J. on plaintiff's objections to Interrogatories.
May	28, "	Hearing concluded C. A. V. Trial Memo filed.
June	10, "	Order entered on motion of defendant, Federal Reserve Bank of Cleveland to compel plaintiff to answer certain In-

terrogatories filed by said defendant more completely, and the objections of plaintiff to the request of defendant Federal Reserve Bank of Cleveland to answer certain Interrogatories, having come on to be heard, upon consideration thereof, it is hereby ordered, adjudged and decreed as follows: (1) The Motion of defendant, Federal Reserve Bank of Cleveland to compel plaintiff to Answer more particularly, specifically, expressly and completely Interrogatories Nos. 7, 8, 9, 10, 13, 16, 19 and 22 is denied. (2) The objections of plaintiff to the request of defendant, Federal Reserve Bank of Cleveland for Answers to Interrogatories Nos. 12, 14, 15, 18, 20, 21 and 23 are sustained.

October 9, 1952 Request by Federal Reserve Bank of Cleveland to Plaintiff for Admissions filed.

" 14, " Acceptance of Service of a copy of request of Federal Reserve Bank of Cleveland to Plaintiff for Admissions in the above entitled action is accepted this 10th day of October 1952, filed by attorneys for plaintiff.

" 17, " Order entered removing case from current Jury Trial List and continuing case to head of trial list commencing February 1953.

" 21, " Objections of Plaintiff, Bank of America National Trust and Savings Asso-

	ciation to Request of Defendant Federal Reserve Bank of Cleveland to admit Facts and the Genuineness of Documents filed. Service of copy accepted thereon by defendant.
November 25, 1952	Hearing on Objection to Request of Defendant to Admit Facts before Gourley, J.
" " "	Hearing concluded. Trial Memo filed.
" " "	Order entered the objections to the motion of the Federal Reserve Bank of Cleveland to admit facts as to the genuineness of documents is hereby continued pending confirmation by the plaintiff, through investigation in the various agencies of the U. S. as to the genuineness of the documents in question. The proceeding is to be continued generally until such time as counsel for the plaintiff or any of the party defendants requests the court by written motion to re-instate the argument on the motion referred to. Said proceeding not to be set for pre-trial or for trial until compliance is made as herein stated.
January 23, 1953	Transcript of proceedings filed; Hearing on objections of plaintiff to requests by Federal Reserve Bank of Cleveland to plaintiff for admissions before Gourley, J. on 11-25-52.
September 25, 1953	Order assigning case to Willson, J. for Jury Trial and Disposition.

October	7, 1953	Plaintiff's Answers to Request of Federal Reserve Bank of Cleveland to admit facts and the genuineness of document, filed, with acceptance of service thereon.
December	16, "	Depositions of Walton Brush and James K. Flanagan taken at New York, N. Y. 11-17-53 together with exhibits received, filed.
"	" "	Request for Answers to Interrogatories filed; Service of copy accepted thereon.
"	" "	On February, 1954 Jury Trial List for Willson, J.
February	2, 1954	Depositions of Witness, J. Frances Moore, Retta C. Walsmith, *et al.* with Exhibits taken at Washington, D. C. 1-26-54 received, filed. On Jury Trial List of Willson, J. commencing 4-12-54.
April	5, "	Answer to Interrogatories filed.
"	15, "	Pretrial before Willson J. Trial Memo filed.
"	21, "	Order Court entered continuing trial of case to Fall Term Court.
June	24, "	Transcript of Official Notes of proceedings of pretrial conference, at Pgh., Pa. on 4-15-54 before Willson, J. filed.
Oct.	6, "	Petition for Writ of Habeas Corpus *Ad Testificandum* for Arthur A. Rocco; Order entered directing issue of same from Lewisburg, Pa. Hearing 10-11-54 at 10:00 A. M. Pgh. before Willson, J.
"	" "	Writ issued.

Oct.	6, 1954	Petition, Order for Writ of Habeas Corpus *Ad Testificandum* for Arthur A. Rocco; Order entered rescinding earlier Order for Lewisburg; This Order for Leavenworth, Kansas—Rocco to appear Pgh. Pa. Hearing on 10-11-54, before Willson, J.
"	" "	Writ issued.
"	" "	Hearing on pre-trial before Willson, J. begun.
"	" "	Hearing concluded. Trial Memo filed.
"	7, "	Writ *Ad Testificandum* for Lewisburg returned unexecuted.
"	8, "	Transcript of official notes of pretrial held 10-6-54, before Willson, J. filed.
"	11, "	Trial opens before Willson, J. and a Jury.
"	12, "	Trial continues.
"	13, "	Trial continues.
"	13, "	Motion to Dismiss action against the Federal Reserve Bank of Cleveland, filed.
"	" "	After presentation of all the evidence by the plaintiff the Motion to Dismiss action by Federal Reserve Bank of Cleveland is hereby granted, and the action is dismissed as to the said deft.
"	" "	Pursuant to Order the above action is hereby dismissed as to the defendant the Federal Reserve Bank of Cleveland,

JAMES H. WALLACE, JR.
Clerk.

Oct.	14, 1954	Motion for Directed Verdicts filed by plaintiff.
"	14, "	Motion for Directed Verdict filed by First Nat'l. Bank in Indiana.
"	14, "	Trial continues.
"	15, "	Trial continues.
"	15, "	Request for charge on behalf of plaintiff filed.
"	15, "	Points in behalf of First National Bank in Indiana defendant filed.
"	" "	Points for charge on behalf of Gilbert S. Parnell defendant filed.
"	" "	Substitute points and additional points in behalf of First National Bank in Indiana filed.
"	" "	Point of Defendant Rocco filed.
"	" "	Trial closed. Trial Memo filed.
"	" "	The Jury find in favor of the plaintiff and against the defendant Gilbert S. Parnell in the sum of $57,600.00. Verdict filed.
"	" "	Jury find in favor of the plaintiff and against the defendant Arthur A. Rocco in the sum of $57,600.00. Verdict filed.
"	" "	Jury find in favor of the plaintiff and against the defendant First National Bank in Indiana in the sum of $57,600.00. Verdict filed.
"	" "	Order of Court entered in accordance with verdict of the jury returned this date on each of the three verdict slips submitted; that in favor of the plaintiff and against each of the said defend-

ants, Arthur A. Rocco, Gilbert S. Parnell and First National Bank in Indiana in the sum of $57,600.00. The Clerk of this Court is directed to enter judgment in favor of the Bank of America National Trust and Savings Association, plaintiff, and against the First National Bank in Indiana, defendant, in the sum of $57,600, and in favor of Bank of America National Trust and Savings Ass'n. Plaintiff, against Arthur A. Rocco, defendant, in the sum of $57,600.00 and in favor of the Bank of America National Trust and Savings Assoc., plaintiff against Gilbert S. Parnell, Defendant in the sum of $57,600.00.

October 15, 1954 Pursuant to Verdicts and Order, Judgment is hereby entered in favor of the plaintiff and against each of the defendants, Arthur A. Rocco in the sum of $57,600.00, Gilbert S. Parnell in the sum of $57,600.00 and against First National Bank in Indiana in the sum of $57,600.00.

JAMES H. WALLACE, JR.
Clerk (J. ent. 10/15/54).

October 15, " Notices sent.

" 22, " Motion for New Trial filed by Gilbert S. Parnell.

" " " Motion and Reasons to set aside judgment on the Verdict against First Na-

		tional Bank in Indiana, Pa., or in the event dismissed, then to open said Judgment and Grant a New Trial filed.
October	25, 1954	Motion for Nonsuit or Involuntary Dismissal filed; Order granting filing of Motion, by Gilbert Parnell.
"	" "	Motion of plaintiff to Alter or Amend Judgments filed.
"	" "	Motion for Judgment in accordance with Motion for Directed Verdict filed by attorneys for defendant Rocco.
November	6, "	Writ of Habeas Corpus *Ad Testificandum* for Arthur A. Rocco returned executed.
"	15, "	Hearing on Motion for New Trial; Motion for Non Suit or Involuntary Dismissal; Motion of Plaintiff to alter or Amend Judgment; Motion for Judgment in accordance with Motion for directed Verdict before Willson, J. began.
"	15, "	Hearing concluded C. A. V. (Motion for Judgment in accordance with Motion for Directed Verdict *re* Rocco withdrawn orally by Vincent H. Casey, Esq.)
"	15, "	Trial Memo filed.
"	16, "	Memorandum opinion of Willson, J. filed and Order entered directing that (1) Motions of Gilbert S. Parnell for Judgment *N. O. V.* in his favor and for a New Trial are refused; (2) Motions of the First National Bank in Indiana for judgment *N. O. V.* in its favor and

		for a new trial are refused, and (3) Motion of Plaintiff, Bank of America National Trust and Savings Association to amend the judgment to include interest at six per centum per annum on the amount of the Jury's verdict is also refused.
November	30, 1954	Notice of Appeal by First National Bank in Indiana, Pa. one of the Defendants filed.
"	30, "	Supersedeas Bond approved by Court and entered in amount of $70,000.00, by defendant for First National Bank in Indiana.
"	" "	Copy mailed Clerk U. S. Court of Appeals and Counsel of record.
"	" "	Notice of Appeal filed by Attorneys for defendant Gilbert S. Parnell.
"	" "	Check in Amount of $250.00 for Costs on Appeal Deposited with the Clerk.
December	1, "	Copy of Notice of Appeal filed by Gilbert S. Parnell, mailed Clerk U. S. Court of Appeals. Counsel of record notified.
"	7, "	Designation of Contents of Record for Appeal filed by Attorney for First National Bank in Indiana. Service Accepted.
"	7, "	Statement of Points Under Rule 75(d) of Federal Rules of Civil Procedure filed by Attorney for First National Bank of Indiana. Service accepted by Pltf.

December 7, 1954 Transcript of Official Notes of Proceedings, Trial at Pittsburgh, Pa., beginning Oct. 11, 1954, before Willson, J. and a Jury, received and filed.

Complaint.

(Filed Feb. 15, 1951.)

1. Plaintiff is a national banking association organized and existing under the laws of the United States of America and having its principal place of business in the City of San Francisco, San Francisco County, California.

2. Defendant, Arthur A. Rocco, is a citizen of the Commonwealth of Pennsylvania and resides in the City of Pittsburgh, Allegheny County, Pennsylvania.

3. Defendant, Gilbert S. Parnell, is a citizen of the Commonwealth of Pennsylvania and resides in the City of Indiana, Indiana County, Pennsylvania.

4. Defendant, First National Bank in Indiana, is a national banking association organized and existing under the laws of the United States of America and having its principal place of business in the City of Indiana, Indiana County, Pennsylvania.

5. Defendant, Federal Reserve Bank of Cleveland, is a corporation organized and existing under the laws of the United States of America, having its principal place of business in the City of Cleveland, Cayuhoga County, Ohio, and doing business in the Commonwealth of Pennsylvania through its branch bank located in the City of Pittsburgh, Allegheny County, Pennsylvania.

6. Jurisdiction is founded on diversity of citizenship and the amount in controversy, which, exclusive of interest and costs, exceeds the sum of Three Thousand ($3,000.00) Dollars.

7. On or about September 28, 1948, defendant, Arthur A. Rocco, converted to his own use forty-three Home Owners' Loan Corporation Bonds, 3%, Series A, of the value of $19,600.00, dated May 1, 1934, due May 1, 1952, and callable on or after May 1, 1944, having the following denominations and serial numbers, the property of plaintiff:

Sixteen Bonds, each having a denomination of $100 and being numbered:
AT 410263C, AT 410264D, AT 410265E, AT 602357H, AT 602355E, AT 602356F, AT 61295E, AT 61296F, AT 68878J, AT 68879K, AT 61297H, AT 61298J, AT 599981A, AT 454349K, AT 666611A, and AT 666612B.

Eighteen Bonds, each having a denomination of $500 and being numbered:
AX 105344D, AX 194519K, AX 80540L, AX 183042B, AX 13113C, AX 51123C, AX 93578J, AX 17958J, AX 40777H, AX 5363C, AX 123185E, AX 183296F, AX 183297H, AX 113674D, AX 53890L, AX 53891A, AX 53892B, and AX 104719K.

Nine Bonds, each having a denomination of $1,000 and being numbered:
AM 254596F, AM 254595E, AM 10953C, AM 280769K, AM 187237H, AM 190948J, AM 215883C, AM 215884D, and AM 215885E.

8. On or about September 28, 1948, defendant, Gilbert S. Parnell, converted to his own use the said Bonds re-

ferred to above in paragraph numbered 7, the property of plaintiff.

9. On or about September 28, 1948, defendant, First National Bank in Indiana, converted to its own use the said Bonds referred to above in paragraph numbered 7, the property of plaintiff.

10. On or about September 30, 1948, defendant, Federal Reserve Bank of Cleveland, converted to its own use the said Bonds referred to above in paragraph numbered 7, the property of plaintiff.

11. Or or about October 25, 1948, defendant, Arthur A. Rocco, converted to his own use thirty Home Owners' Loan Corporation Bonds, 3%, Series A, of the value of $38,000, dated May 1, 1934, due May 1, 1952, and callable May 1, 1944, having the following denominations and serial numbers, the property of plaintiff:

Twenty-eight Bonds, each having a denomination of $1,000 and being numbered:
AM 34340L, AM 303901A, AM 303902B, AM 303903C, AM 304783C, AM 35023C, AM 35024D, AM 272763C, AM 272764D, AM 272765E, AM 70273C, AM 70274D, AM 271373C, AM 271374D, AM 328483C, AM 328484D, AM 472517H, AM 515427H, AM 315875E, AM 303912B, AM 304781A, AM 304782B, AM 515428J, AM 166129K, AM 166130L, AM 166131A, AM 166132B, and AM 90180L.

Two Bonds, each having a denomination of $5,000 and being numbered:
AV 20954D and AV 21112B.

12. On or about October 25, 1948, defendant, Gilbert S. Parnell, converted to his own use the Bonds referred to

above in paragraph numbered 11, the property of plaintiff.

13. On or about October 25, 1948, defendant, First National Bank in Indiana, converted to its own use the Bonds referred to above in paragraph numbered 11, the property of plaintiff.

14. On or about October 28, 1948, defendant, Federal Reserve Bank of Cleveland, converted to its own use the Bonds referred to above in paragraph numbered 11, the property of plaintiff.

WHEREFORE, plaintiff demands judgment against the defendants and each of them in the amount of $57,600, interest and costs.

ROBERT L. KIRKPATRICK,
ROBERT L. BECKER, JR.,
KIRKPATRICK, POMEROY, LOCKHART & JOHNSON,
1130 Oliver Building,
Pittsburgh 22, Pennsylvania,
Attorneys for Plaintiff.

Answer of First National Bank in Indiana, a Defendant Named in the Above Case.

(Filed Mar. 6, 1951.)

The Answer of the First National Bank in Indiana, a defendant named in the above case, respectfully represents:

1. Paragraph one of the complaint is admitted.

2. Paragraph two of the complaint is admitted.

3. Paragraph three of the complaint is admitted.

4. Paragraph four of the complaint is admitted.

5. Paragraph five of the complaint is admitted.

6. Paragraph six of the complaint is admitted for the purposes of this case.

7. Paragraph seven of the complaint is denied. In further answer thereto, defendant, First National Bank in Indiana, alleges as follows:

(a). That all of the said bonds described in paragraph seven of the complaint were negotiable and payable to bearer.

(b). That on the 28th day of September, 1948, one Gilbert S. Parnell, an attorney, delivered the said bonds described in paragraph seven to the defendant, First National Bank in Indiana, for redemption.

(c). That on said date, September 28, 1948, defendant, First National Bank in Indiana, by registered mail sent said bonds described in paragraph seven to the Pittsburgh Branch of the Federal Reserve Bank, Fiscal Agent of the United States, Pittsburgh 19, Pennsylvania, for redemption. A photostatic copy of the letter accompanying said bonds is hereto attached, made a part of this Answer, and is marked "Exhibit 1."

(d). That pursuant to the instructions in said letter, the Pittsburgh Branch of the Federal Reserve Bank, Fiscal Agent of the United States, upon receipt of said letter and said bonds on the 30th day of September 1948, deposited to the credit of First National Bank in Indiana, Pennsylvania, *inter alia* the proceeds of said bonds, namely, the

sum of $19,600.00. A photostatic copy of said credit deposit slip being hereto attached, made a part hereof, and is marked "Exhibit 2."

(e). Thereafter, on October 1, 1948, First National Bank in Indiana, named as a defendant in the above case, paid to the said Gilbert S. Parnell, attorney, (less $10.00 expenses), the sum of $19,590.00. A photostatic copy of the cashier's check in payment thereof to said Gilbert S. Parnell is hereto attached, made a part hereof, and is marked "Exhibit 3."

8. Paragraph eight of the complaint is denied for the reasons as set forth in paragraph seven hereof.

9. Paragraph nine of the complaint is denied for the reasons as stated in paragraph seven hereof.

10. Paragraph ten is denied for the reasons as stated in paragraph seven of this Answer.

11. Paragraph eleven is denied. In further answer thereto defendant, First National Bank in Indiana, alleges as follows:

(f) That all of the said bonds described in Paragraph Seven of the Complaint were negotiable and made payable to bearer.

(g) That on the 25th day of October, 1948, one Gilbert S. Parnell, an Attorney, delivered said bonds described in Paragraph Seven to the defendant, First National Bank in Indiana, for redemption.

(h) That on October 25, 1948, said defendant, First National Bank in Indiana, by registered mail sent said

bonds described in Paragraph Eleven to the Pittsburgh Branch of the Federal Reserve Bank, Fiscal Agent of the United States, Pittsburgh, Pennsylvania, for redemption. A photostatic copy of the letter accompanying said bonds is hereto attached, made a part of this Answer, and is marked "Exhibit 4."

(i) That pursuant to the instructions in said letter, the Pittsburgh Branch of Federal Reserve Bank, Fiscal Agent, upon receipt of said letter and said bonds on the 26th day of October, 1948, deposited to the credit of the First National Bank in Indiana the proceeds of said bonds namely, the sum of $38,000.00. A photostatic copy of said credit deposit slip being hereto attached, made a part hereof, and is marked "Exhibit 5."

(j) Thereafter, on the 28th day of October, 1948, the First National Bank in Indiana, named as a defendant, paid to the said Gilbert S. Parnell, Attorney, the proceeds received for said bonds (less $20.00 expenses), the sum of $37,980.00. A photostatic copy of the cashier's check in payment thereof to said Gilbert S. Parnell is hereto attached, made a part hereof, and is marked "Exhibit 6."

12. Paragraph Twelve of the Complaint is denied for the reasons as stated in the Answer to Paragraph Eleven hereof.

13. Paragraph Thirteen of the Complaint is denied for the reasons as stated in Paragraph Eleven hereof.

14. Paragraph Fourteen of the Complaint is denied for the reasons as stated in Paragraph Eleven hereof.

15. In further answer to the Complaint filed in the above case, defendant, the First National Bank in Indiana,

alleges that it never has received any notice or knowledge of any defects or infirmity in any of the bonds set forth herein in Paragraphs Seven and Eleven of the Complaint, and therefore, denies its liability to the plaintiff in the sum of $57,600.00, or in any sum of money whatever.

FIRST NATIONAL BANK IN INDIANA,

By .....

Commonwealth of Pennsylvania, }
County of Allegheny. } ss.:

Before me, the undersigned authority, personally appeared Paul J. Straitiff, who being duly sworn according to law, deposes and says he is cashier of the First National Bank in Indiana, one of the defendants above named, who being sworn according to law, deposes and says that the allegations of fact set forth in the foregoing Answer are true and correct, and that he is duly authorized to make this affidavit in behalf of the First National Bank in Indiana, one of the defendants above named.

PAUL J. STRAITIFF.

Sworn to and subscribed before me,
this Second day of March, 1951.
Ruth Hogan,
Notary Public.
(Seal) My Commission expires Jan. 27, 1953.

Exhibit 1 attached to Answer.

EXHIBIT 1.

No. 14098

THE FIRST NATIONAL BANK
Indiana, Pennsylvania Sept. 28, 1948.

Pittsburgh Branch,
Federal Reserve Bank,
Fiscal Agent of the United States,
Federal Reserve Station,
Pittsburgh 19, Pennsylvania.

Gentlemen:—

We enclose the following HOME OWNERS LOAN CORPORATION 3% Bonds of the United States of America Series A. We will ask you to credit our account with the proceeds.

9 Bonds $1000.00 each Numbered.	*18 Bonds of $500.00 each Numbered*	*16 Bonds of $100.00 each Numbered.*
AM 10953C	AX105344D	AT 410265E
215884D	80540L	602356F
215885E	40777H	68878J.
254596F	93578J	61295E
187237H	53892B	410263C
254595E	13113C	602357H
280769K	194519K	602355E
190948J	5363C	599981A
215883C	51123C	68879K
	104719K	454349K
	183296F	61296F
	113674D	61297H.
	17958J	61298J
	53891A	666612B
	53890L	666611A

Exhibit 2 attached to Answer.

18 Bonds of $500.00 each Numbered	*16 Bonds of $100.00 each Numbered*
183042B	410264D
123185E	
183297H	

Very truly yours,

T. EDGAR WALKER,
T. EDGAR WALKER,
Ass't. Cashier.

EXHIBIT 2.

P—SC 46 10M 6-47

Pittsburgh Branch
Federal Reserve Bank
of Cleveland

Security-Coupon
Department

CREDIT First National Bank,
Indiana Pa.

Date 9/30/48

NOTE: All coupons credited subject to count and verification (SEC)

Letter Dated		Amount
9/28/48	Proceeds redemption:	
	2¾% Treas Bds 48-51	$ 7,300.00
	3% HOLC Bds Series A 1944-52	19,600.00

[X] Treasurer, United States

Charged to

[ ] Matured Coupons Held
Pending Shipment—Pittsburgh

Correct	Approved
Smith	Johnson

Exhibit 4 attached to Answer.

EXHIBIT 3.

FNB 60-682

FIRST NATIONAL BANK IN INDIANA

Indiana, Pa. October 1, 1948 No. 25360

Pay to the
order of Gilbert S. Parnell Sr., Attorney at Law. .....
..... $19,590.00

First Nat. Bank
in Indiana, Pa. $19,590 & 00 Cts .....Dollars

Cashier's Check

T. EDGAR WALKER,
Asst. Cashier.

(Endorsed on back):
GILBERT S. PARNELL, SR.
Attorney-At-Law

EXHIBIT 4.

October 25, 1948.

Pittsburgh Branch, Federal Reserve Bank,
Fiscal Agent of the United States,
Federal Reserve Station,
Pittsburgh 19, Pennsylvania.

Gentlemen:

We enclose herewith the following HOME OWNERS LOAN CORPORATION 3% Bonds of the United States of America Series A. You will please credit out account with the proceeds.

Exhibit 5 attached to Answer.

2 Bonds of $5000.00 each Numbered.	*28 Bonds of $1000.00 each Numbered.*	
AV20954D.	AM303912B	AM328484D
AV21112 B	AM304781A	AM472517H.
	AM304782B	AM515427H
	AM304783C	AM515428J.
	AM272763C	AM315875E
	AM272764D	AM303903C
	AM272765E	AM303902B
	AM35023C	AM303901A.
	AM35024D	AM166131A.
	AM70273C	AM166129K
	AM70274D	AM166130L
	AM271373C	AM90180L
	AM271374D.	AM166132B
	AM328483C.	AM34340L

Very truly yours,

T. EDGAR WALKER,
Ass't. Cashier.

Registry Receipt Attached.

EXHIBIT 5.

P—SC 46 10M 6-47
Pittsburgh Branch
Federal Reserve Bank of Cleveland

Security-Coupon Department

CREDIT First National Bank
Indiana, Pa.

Date Oct. 26, 1948

NOTE: All coupons credited subject to count and verification (SEC)

Letter Dated		Amount
10/25/48	Proceeds redemption 3% HOLC Bds., Series A-1944-52	$38,000.00

Exhibit 6 attached to Answer.

[X] Treasurer, United States

Charged to

[ ] Matured Coupons Held
Pending Shipment—Pittsburgh
Correct Approved
Bennett Johnson

EXHIBIT 6.

FNB 60-682

FIRST NATIONAL BANK IN INDIANA

Indiana, Pa. Oct. 28 1948 No. 25439

Pay to the
order of G. S. Parnell, Attorney, ...$37,980.00

First Nat. Bank
in Indiana, Pa. $37,980 & 00 Cts. .....Dollars

Cashier's Check

T. EDGAR WALKER,
Asst. Cashier.

(Endorsed on back):
G. S. PARNELL,
Attorney.

Request by First National Bank in Indiana for Admission.

(Filed Mar. 26, 1951.)

Now comes the Defendant, First National Bank in Indiana, by its attorneys of record and pursuant to the provisions of Rule 36, Paragraph (a) of Federal Rules of Civil Procedure, and requests the Plaintiff to admit the correctness of the following facts, answer to be made within fifteen (15) days from the date hereof in the manner provided by said rule:

FIRST: The sub-paragraphs in answer to Paragraph 7 of the answer filed as follows:

(a). That all of the said bonds described in Paragraph 7 of the Complaint filed were negotiable and payable to bearer.

(b). That on the 28th day of September, 1948, one Gilbert S. Parnell, an attorney and depositor of defendant's bank, delivered the said bonds described in Paragraph 7 to the defendant, First National Bank in Indiana, for redemption.

(c). That on said date, September 28, 1948, defendant, First National Bank in Indiana, by registered mail sent said bonds described in Paragraph 7 to the Pittsburgh Branch of the Federal Reserve Bank, Fiscal Agent of the United States, Pittsburgh 19, Pennsylvania, for redemption. A photostatic copy of the letter accompanying the said bonds is attached to the Answer filed and is marked "Exhibit 1".

(d). That pursuant to the instructions in said letter, the Pittsburgh Branch of the Federal Reserve Bank, Fiscal

Agent of the United States, upon receipt of said letter and said bonds on the 30th day of September, 1948, deposited to the credit of First National Bank in Indiana, Pennsylvania, *inter alia*, the proceeds of said bonds, namely, the sum of $19,600.00. A photostatic copy of said credit deposit slip is attached to the Answer filed and is marked "Exhibit 2".

(e). Thereafter, on October 1, 1948, First National Bank in Indiana, named as a defendant in the above case, paid to the said Gilbert S. Parnell, Attorney, (less $10.00 expenses) the sum of $19,590.00. A photostatic copy of the cashier's check in payment thereof to said Gilbert E. Parnell is attached to the Answer filed and is marked "Exhibit 3".

SECOND: The sub-paragraphs in answer to Paragraph 11 of the Answer filed as follows:

(f). That all of the said bonds described in Paragraph 11 of the Complaint filed were negotiable and made payable to bearer.

(g). That on the 25th day of October, 1948, one Gilbert S. Parnell, an Attorney and depositor of defendant's bank, delivered said bonds described in Paragraph 11 to the defendant, First National Bank in Indiana, for redemption.

(h). That on October 25, 1948, said defendant, First National Bank in Indiana, by registered mail sent said bonds described in Paragraph 11 to the Pittsburgh Branch of the Federal Reserve Bank, Fiscal Agent of the United States, Pittsburgh, Pennsylvania, for redemption. A photostatic copy of the letter accompanying said bonds is attached to the Answer filed and is marked "Exhibit 4".

(i). That pursuant to the instructions in said letter, the Pittsburgh Branch of Federal Reserve Bank, Fiscal Agent, upon receipt of said letter and said bonds on the 26th day of October, 1948, deposited to the credit of the First National Bank in Indiana the proceeds of said bonds, namely, the sum of $38,000.00. A photostatic copy of said credit deposit slip is attached to the Answer filed and is marked "Exhibit 5".

(j). Thereafter, on the 28th day of October, 1948, the First National Bank in Indiana, named as a defendant, paid to the said Gilbert S. Parnell, Attorney, the proceeds received for said bonds (less $20.00 expenses), the sum of $37,980.00. A photostatic copy of the cashier's check in payment thereof is attached to the Answer filed and is marked "Exhibit 6".

MILLER & MILLER,

By HARVEY A. MILLER,
Attorneys for First National Bank in Indiana.

Commonwealth of Pennsylvania, }
County of Indiana. } ss.:

Before me, the undersigned authority, personally appeared Paul J. Straitiff, who being duly sworn according to law, deposes and says he is cashier of the First National Bank in Indiana, one of the defendants above named and that the allegations of fact set forth in the foregoing Request for Admission are true and correct according to the best of his knowledge, information and belief and that he

is duly authorized to make this Affidavit in behalf of the First National Bank in Indiana, one of the Defendants above named.

PAUL J. STRAITIFF.

Sworn to and subscribed before me
this 22nd day of March, 1951.
Ruth Hogan,
Notary.

(SEAL)

Plaintiff's Answer to Request for Admissions of Defendant, First National Bank in Indiana.

(Filed May 2, 1951.)

Now comes plaintiff, Bank of America National Trust and Savings Association, and makes the following Answer to the Request for Admissions of defendant, First National Bank in Indiana, under Rule 36, Paragraph (a) of the Federal Rules of Civil Procedure:

FIRST: The subparagraphs in answer to Paragraph 7 of the Answer of defendant, First National Bank in Indiana, filed, as follows:

(a) It is admitted that the bonds described in Paragraph 7 of the Complaint were payable to bearer, but that portion of the statement which concerns the negotiability of said bonds is a conclusion of law which plaintiff is not required to admit or deny.

(b) It is admitted that on September 28, 1948, one Gilbert S. Parnell, an attorney, delivered the said bonds de-

scribed in Paragraph 7 to the defendant, First National Bank in Indiana, with the qualification that "attorney" be construed to mean "attorney at law". However, plaintiff cannot truthfully admit or deny that said Gilbert S. Parnell was a "depositor" of defendant's Bank or that said Gilbert S. Parnell delivered the said bonds to defendant, First National Bank in Indiana, "for redemption". Plaintiff has no knowledge as to such matters which are peculiarly within the knowledge of defendants and provable only by the testimony of persons hostile to plaintiff.

(c) It is admitted that on said date, September 28, 1948, defendant, First National Bank in Indiana, by registered mail sent said bonds described in Paragraph 7 to the Pittsburgh Branch of the Federal Reserve Bank, Fiscal Agent of the United States, Pittsburgh 19, Pennsylvania. Plaintiff cannot truthfully admit or deny that said bonds were so sent "for redemption". Plaintiff has no knowledge with respect thereto and the facts are peculiarly within the knowledge of defendants and provable only by the testimony of persons hostile to plaintiff. Plaintiff specifically denies that the letter attached to the Answer filed by First National Bank in Indiana and marked "Exhibit 1" is a photostatic copy of the letter accompanying said bonds.

(d) Admitted.

(e) Admitted with the qualification that "Gilbert S. Parnell, Attorney" be construed as "Gilbert S. Parnell, Sr., Attorney at Law".

SECOND: The subparagraphs in answer to Paragraph 11 of the Answer filed as follows:

(f) It is admitted that the bonds described in Paragraph 11 of the Complaint were payable to bearer, but that portion of the statement which concerns the negotiability of said bonds is a conclusion of law which plaintiff is not required to admit or deny.

(g) It is admitted that on October 25, 1948, one Gilbert S. Parnell, an attorney, delivered the said bonds described in Paragraph 11 to the defendant, First National Bank in Indiana, with the qualification that "attorney" be construed to mean "attorney at law". However, plaintiff cannot truthfully admit or deny that said Gilbert S. Parnell was a "depositor" of defendant's Bank or that said Gilbert S. Parnell delivered the said bonds to defendant, First National Bank in Indiana, "for redemption". Plaintiff has no knowledge as to such matters which are peculiarly within the knowledge of defendants and provable only by the testimony of persons hostile to plaintiff.

(h) It is admitted that on October 25, 1948, defendant, First National Bank in Indiana, by registered mail sent said bonds described in Paragraph 11 to the Pittsburgh Branch of the Federal Reserve Bank, Fiscal Agent of the United States, Pittsburgh 19, Pennsylvania. Plaintiff cannot truthfully admit or deny that said bonds were so sent "for redemption". Plaintiff has no knowledge with respect thereto and the facts are peculiarly within the knowledge of defendants and provable only by the testimony of persons hostile to plaintiff. Plaintiff specifically denies that the letter attached to the Answer filed by First National Bank in Indiana and marked "Exhibit 4" is a photostatic copy of the letter accompanying said bonds.

(i) Admitted.

(j) Admitted with the qualification that "Gilbert S. Parnell, Attorney" be construed as "G. S. Parnell, Attorney".

ROBERT L. KIRKPATRICK,
ROBERT L. BECKER, JR.,
KIRKPATRICK, POMEROY,
LOCKHART & JOHNSON,
Attorneys for Plaintiff.

State of California, }
County of Los Angeles. } ss.:

Before me, the undersigned notary public, personally appeared W. H. Goodrich, who being duly sworn according to law, deposes and says that he is the Assistant Vice President of Bank of America National Trust and Savings Association, plaintiff above-named; that the statements set forth in the foregoing Answer to Request for Admissions are true and correct according to the best of his knowledge, information and belief and that he is duly authorized to make this Affidavit on behalf of Bank of America National Trust and Savings Association, plaintiff above-named.

W. H. GOODRICH.

Sworn to and subscribed before me this
30th day of April, 1951.
Jean Sinness,
Notary Public.
My commission expires: Sept. 14, 1952.

(SEAL)

Transcript of Testimony.

[14] AFTERNOON SESSION.

Monday, October 11, 1954
2:00 P. M.

The Court:

Proceed, Mr. Kirkpatrick.

Mr. Kirkpatrick:

If the Court please, I would like to call as a witness, Rudolf Frueholz.

The Court:

While the witnesses are being sworn, the attorneys will remain standing or seated.

RUDOLF FRUEHOLZ, called as a witness on behalf of the plaintiff, having been duly sworn, testified as follows:

Direct Examination:

By Mr. Kirkpatrick:

Q. Your name is Rudolf Frueholz?

A. That's right.

Q. Where do you live, Mr. Frueholz?

A. I live in Alhambra, California.

Q. Is that near Los Angeles?

A. That is near Los Angeles, approximately twelve miles from the downtown area.

Q. Would you keep your voice up so that the members of the jury could hear you also?

A. Sorry.

Q. By whom are you employed?

A. I am employed by the Bank of America National Trust and [15] Savings Association, at its Los Angeles main office, in Los Angeles.

Q. How long have you been employed by the bank?

A. I have been with the Bank of America for approximately eighteen years. That is with the exception of four years during which time I was on military leave and overseas as a member of the United States Army during World War Two.

Q. In what capacity are you presently employed by the bank?

A. I am assistant cashier and operations officer at the Los Angeles main office.

Q. In that capacity, are you in charge of the records of the bank with respect to the bonds purchased by the bank?

A. I am.

(Bond marked as Plaintiff's Exhibit No. 1. Paper marked as Plaintiff's Exhibit 1-A.)

Mr. Kirkpatrick:

If the Court please, I offer in evidence as Plaintiff's Exhibit 1, an original Home Owners Loan Corporation three per cent bond, dated May 1, 1934, due May 1, 1952, redeemable on and after May 1, 1944, interest payable May 1 and November 1; the bond being in the principal amount of $1,000, and bearing serial number AM 166130L.

Mr. Duggan:

May I ask what the purpose of your offer is?

Mr. Kirkpatrick:

The purpose of the offer is to prove [16] the bond as one of the bonds owned by the Bank of America.

Mr. Duggan:

And that is all at this time?

Mr. Kirkpatrick:

That is all at this time.

Mr. Duggan:

Very well.

The Court:

No objection?

Mr. Duggan:

None to that—

The Court:

The bond is admitted.

Mr. Kirkpatrick:

If the Court please, I offer in evidence as Plaintiff's Exhibit 1-A, a two page typewritten document, being a typewritten form of the specimen bond involved in this case. Exhibit 1, which has previously been offered, is so mutilated in connection with the cancellation of the bond as to be not readable. I therefore offer the typewritten copy as proof of the text of all of the bonds involved in this case.

Mr. Duggan:

No objection for that purpose.

The Court:

Now let's see, gentlemen, for the defendants here, do I understand, then, unless the Court hears from all of you, that whoever speaks is speaking for all of you? What is your procedure going to be?

Mr. Duggan:

I think that is correct, is it not?

Mr. Harrison:

If you object, I think we all should have the benefit of it. If you do not object, some of us might want to.

Mr. Duggan:

Very well.

[17] *Mr. Casey:*

It is understood, then, if the Court please, that when one attorney objects, that all the rest of us may have the benefit of that objection.

The Court:

I don't mean that. Mr. Duggan said "No objection." I didn't hear from the rest of you. If we proceed on that basis, unless I hear from you, I assume there is no further objection.

Counsel:

That is right.

Mr. Duggan:

We have no objection for the purpose stated by counsel.

The Court:

That is admitted, then.

(Documents marked as Plaintiff's Exhibit No. 2.)

Mr. Kirkpatrick:

If the Court please, I am handing to the Court another copy of Exhibit 1-A. I have no copies of the original bond, Plaintiff's Exhibit 1.

Q. Mr. Frueholz, I hand you a group of sheets of paper, twenty in number, which have been stapled together and for identification marked Plaintiff's Exhibit 2, and ask if you can tell me and the members of the jury what that exhibit consists of?

A. This is a bond form, known as Bond 21, which our bank uses to show when and from whom certain bonds were bought.

Q. Was it a form regularly in use by the bank in May of 1944?

A. It was.

[18] Q. I call your attention to the first sheet of Exhibit 2, and ask you what that sheet shows.

Mr. Duggan:

May I see one of the copies, please?

Mr. Kirkpatrick:

Surely.

A. The first form shows—

Mr. Duggan:

Wait a minute, Mr. Frueholz.

A. I beg your pardon.

Mr. Duggan:

Is this testimony offered for the same purpose as it was suggested that Exhibits 1 and 1-A were offered?

Mr. Kirkpatrick:

The testimony is offered, your Honor, for the purpose of showing that the bonds in suit were owned by the plaintiff and were a part of a larger group of bonds also owned by the plaintiff.

Mr. Duggan:

No objection for that purpose.

The Court:

Proceed.

A. The first ticket shows that on April 24, 1944, our Oceanside branch, No. 184, bought one twenty-five dollar par value three per cent Home Owners' Loan Corporation bond, 1944-52, paying therefor, twenty-five dollars. The seller's name is O. M. Morris. The bond was bought from an individual by the name of O. M. Morris.

Q. Does the form also show the number of the particular bond covered by it?

A. Yes, it does show that it was Bond No. AP8505E.

Mr. Duggan:

Mr. Kirkpatrick, are all of these purchase [19] slips that you are going to question the witness about similar to the one you showed me? I mean, from different persons, perhaps, and dates.

Mr. Kirkpatrick:

From different persons and dates, and also as to bond numbers.

Mr. Duggan:

Yes, sir. That is all right.

Q. Looking at the second sheet, Mr. Frueholz, does that relate to the same type of bond, same issue of bonds?

A. Same issue of bond.

Q. And how many bonds are covered by that second sheet of Exhibit 2?

A. There were six bonds on the second sheet, totaling $775 par. Three $25 bonds, two $100 bonds, and one $500 bond.

Q. Will you give the numbers of the bonds?

A. The $25 bonds were numbered AP81953C, as in "Charles." AP181309K. AP156552B, as in "boy." The two $100 bonds were numbered AT599981A, and AT599982B. The $500 bond was numbered AX123185E.

Q. Now, the third sheet. What bonds are covered by the third sheet of Exhibit 2?

A. That was four $1000 bonds, for which we paid $4,000 to Mrs. E. D. Zalesky at our La Jolla branch, No. 170. The bonds were numbered, serial number AM246663C, AM359963C.

Q. Pardon me. Is that not 395, Mr.—did you transpose the numbers there? The second one?

[20] A. The second bond shows here 395963C, as in "Charles." I beg your pardon. AM395962B, as in "boy." AM359088J.

Q. The fourth sheet of Exhibit No. 2, what does it—

A. Covers the same type of bond, with a par value of $1,575, and consisting of three $500 bonds, one $50 bond, and one $25 bond, with the following serial numbers: The $500 bonds were listed with serial numbers AX53890L, AX53891A, AX53892B.

The $50 bond was numbered AR55598J. The $25 bond bore serial number AP57971A.

Q. The fifth sheet, what does it cover, of Exhibit 2?

A. $6,500 par value, same kind of Home Owners Loan Corporation bonds of the following denominations: There were three $5000 bonds, one $1000 bond, and one $500 bond The $5,000 bonds were numbered AV, as in "Victor," 21112B, AV1025E, AV21113C.

The $1,000 bond was numbered AM10953C. And the $500 bond was numbered AX5363C.

Q. Sheet No. 6 of Exhibit 2, what bonds are covered by that sheet?

A. $2,000 par value bonds of the same issue, plus accrued interest of $30, and we paid therefor $2,030, to the National Surety Corporation of Los Angeles.

The bonds were two $1000 bonds, bearing serial numbers AM34340L, and AM111250L.

Q. Sheet No. 7, of Exhibit 2; what does it show?

[21] A. Two bonds, with a par value of $75, both from M. I. Church and Lillian K. Church, at the Los Angeles main office, Bank of America, on May 1. The bond numbers were AP72963C. That was a $25 bond. A $50 bond bore AR70022B.

Q. Sheet No. 8.

A. Covered three bonds totaling $2,000 par value, the same kind Home Owners Loan Corporation bonds, for which we paid $2,000, and which bore the following numbers: A. M. 482793C, as in "Charles." And it was a $1,000 bond. And there were two $500 bonds, with the numbers AX183296F, and AX1382967—297, I beg your pardon. The number of the second $500 bond should be AX183297H.

Q. The next sheet, which I think is sheet eight of Exhibit 2.

A. Covers $825 par of the same Home Owners Loan Corporation bonds, which we purchased from the Emanuel Presbyterian church, at our Eighth and Vermont branch, on the twenty-ninth of April, and which bonds bore the following numbers: One $500 bond, AX113674D, as in "David." AT74253C, a $100 bond. AT74252B, as in "boy," a $100 bond. AT74251A, a $100 bond. And AP71717H, a $25 bond.

Q. Will you verify or look again at the last number that you just give us, Mr. Frueholz?

A. I am somewhat in doubt about one number there, written in longhand. I have a list here, from which I could refresh my memory, and could ascertain the definite number this [22] bond bought. Is that permissible?

Mr. Casey:

He wasn't there in 1944, was he?

Mr. Kirkpartrick:

He is testifying from the record. He says he has a typewritten list of numbers, of the bonds. It is quite clear on the photostat.

Mr. Casey:

Do you say that that list he has there corresponds to the list in the complaint?

Mr. Kirkpatrick:

It is. It is a list of the bonds in the complaint and the balance of the bonds making up the $100,225.

Is there any objection to his looking at the typewritten list, or at the photostat, where the figures appear clearly?

Mr. Casey:

I have no objection.

Q. Look at the photostat. I think that would be better.

The Court:

How many have you covered?

Mr. Kirkpatrick:

I think nine of them, your Honor.

The Court:

I hear no objection by defense counsel as to this proceeding. It seems to me this witness can refer to it. Give the court reporter the numbers here. Do you have a list there?

Mr. Kirkpatrick:

I think the witness has one, your Honor.

The Court:

Hand that to the reporter, have it marked, and that is the list of the bonds in issue.

[23] A. The correct number is AP21717H. The $25 bond.

Mr. Kirkpatrick:

If your Honor please, we will hand to the reporter a list of the bond numbers covered by the sheets introduced as Exhibit 2, and I understand she may have authority then to incorporate those numbers in the record.

The Court:

She will put the numbers in the record; counsel may examine and compare the numbers with the sheets, with the understanding that this is now in evidence.

Have you put in the total amount involved in the case?

Mr. Kirkpatrick:

I was just going to ask the witness, your Honor.

Q. Mr. Frueholz, have you made a computation as to the number of bonds and the par value of bonds covered by the sheets, which have been identified as Exhibit 2?

A. That is the total number of these 21, Bond 21 forms?

Q. That is correct.

A. Yes, I have.

Q. How many bonds are covered by the receipts which have been identified as Exhibit No. 2?

A. The total number of 134 bonds.

Q. What is the total par value of those bonds?

A. $100,225.

Q. Did the Bank of America own all of those bonds on May 2, [24] 1944, according to the records of the bank?

A. According to the records, the Bank of America did.

Q. Had any of them been taken for collection, or were they all outright purchases by the bank?

A. These were outright purchases, which had been bought and paid for by the bank.

Q. Have you verified, Mr. Frueholz, the numbers, the serial numbers of the bonds, appearing in Exhibit 2, with the serial numbers listed in the complaint?

A. Yes, I have.

Q. Does the complaint cover the serial bonds, the bonds bearing the serial numbers listed in the exhibit and only those serial numbers?

A. I am not quite sure whether I got your question, Mr. Kirkpatrick.

Q. Are the bonds listed in the complaint, totaling $57,600, included in the bonds which are identified in Exhibit 2?

A. They are.

Mr. Kirkpatrick:

If the Court please, plaintiff offers in evidence Exhibit No. 2 as proof of its ownership of the bonds covered by the exhibit.

Mr. Duggan:

For that purpose, defense has no objection.

The Court:

They may be admitted. That exhibit is admitted in evidence.

[25] Q. Referring to the $57,600 par value of bonds covered by the complaint, Mr. Frueholz, can you tell me whether or not, according to the records of the bank, the bank ever disposed, sold, or disposed of those bonds?

A. The bank did not dispose of the bonds or sell them.

Q. Did it ever receive anything on account of the value or proceeds of any of those bonds?

Mr. Duggan:

Just a minute. We would like to ask the counsel for the plaintiff to state the purpose of this line of examination, at the side bar.

The Court:

It seems obvious, under his theory that he has indicated to counsel, in his opening, and under his line of interrogation. Do you have any objection?

Mr. Duggan:

I understand. Yes, I certainly do. We are going to have an offer here. I think it is getting to the point now where we are getting into the meat of this case, and I want it on the record.

The Court:

All right. State your offer.

Mr. Duggan:

I want it stated at side bar.

The Court:

Why at side bar? I don't see there is any necessity at this point to come to side bar.

Make your offer, Mr. Kirkpatrick.

Mr. Kirkpatrick:

If the Court please, the purpose of the inquiry elicited by this question is to show that the bank

never voluntarily parted with possession of these
[26] bonds or sold or disposed of them.

Mr. Duggan:

Is that the only purpose?

Mr. Kirkpatrick:

That is the only purpose.

Mr. Duggan:

Withdraw the objection.

The Court:

No objection. Proceed.

(The pending question was read as follows: "Did it ever receive anything on account of the value or proceeds of any of those bonds?")

A. No. No payment has been received by the Bank of America for these particular bonds.

Q. Can you tell me, Mr. Frueholz, from the records of the bank, whether or not the bank has entered on its records a loss on these bonds in the amount of $57,600?

Mr. Duggan:

That is objected to as incompetent, irrelevant and immaterial.

The Court:

In the previous answer, he has indicated he never sold them.

Read the answer, please.

(The answer was read.)

The Court:

Objection sustained.

Mr. Kirkpatrick:

Cross examine.

If your Honor please, I will exhibit the bond to the jury.

The Court:

If you are going to show those exhibits, you'd better do that now, before the cross examination. If [27] you have exhibits to show, I suggest you do it before the examination.

Mr. Kirkpatrick:

Yes. Just Exhibits 1 and 2, which have been offered in evidence and identified by this witness.

The Court:

Mr. Kirkpatrick, did you hand the reporter the list? That other list? I think that should be offered in evidence, and then it will be on the record.

Q. Do you have a clean one?

A. Yes, I believe I do.

Mr. Kirkpatrick:

He has some notes on this particular one.

A. We have found a copy, identical, with the exception of the notations which I have made in pencil on the other copy.

(Document marked as Plaintiff's Exhibit No. 3.)

(In accordance with instructions of the Court above, Exhibit No. 3 is copied below.)

"The following bonds have been lost or stolen: Home Owners' Loan Corporation 3%—Due May 1, 1944-52

Rudolf Frueholz—Direct.

$50.00	$100.00	$500.00	$1,000.00	$5,000.00	$25.00
AR 117091A	AT 410263C	AX 105344D	AM 254596F	AV 20954D	AP 192061A
AR 120717H	AT 410264D	AX 194519K	AM 254595E	AV 21144D	AP 18005E
AR 189493C	AT 410265E	AX 80540L	AM 34340L	AV 21112B	AP 81953C
AR 55598J	AT 602361A	AX 183042B	AM 111250L	AV 1025E	AP 181309K
AR 70022B	AT 602357H	AX 13113C	AM 47252B	AV 21113C	AP 156552B
	AT 602355E	AX 51123C	AM 47250L		AP 21717H
	AT 602360L	AX 93578J	AM 47621A		AP 8505E
	AT 602356F	AX 17958J	AM 47622B		AP126553C
	AT 665675E	AX 40777H	AM 103653C		AP 7?65E
	AT 665676F	AX 5363C	AM 222169K		AP 57971A
	AT 716284D	AX 123185E	AM 218040L		AP 72963C
	AT 716285E	AX 183296F	AM 218041A		
	AT 716286F	AX 183297H	AM 218042B		
	AT 716287H	AX 113674D	AM 279808J		
	AT 61295E	AX 120195E	AM 303901A		
	AT 61296F	AX 53890L	AM 303902B		
	AT 68878J	AX 53891A	AM 303903C		
	AT 68879K	AX 53892B	AM 304783C		
	AT 61297H	AX 104719K	AM 264830L		
	AT 61298J		AM 482379K		
	AT 599981A		AM 482380L		
	AT 599982B		AM 482381A		
	AT 706332B		AM 35023C		
	AT 74253C		AM 35024D		
	AT 74252B		AM 272763C		
	AT 74251A		AM 272764D		
	AT 454350L		AM 272765E		
	AT 454349K		AM 42128J		
	AT 666610L		AM 42129K		
	AT 666611A		AM 47251A		
	AT 666612B		AM 70273C		
	AT 398942B		AM 70274D		
			AM 271373C		
			AM 271374D		
			AM 328483C		
			AM 328484D		
			AM 472517H		
			AM 515427H		
			AM 315875E		
			AM 303912B		
			AM 304781A		
			AM 304782B		
			AM 515428J		
			AM 10953C		
			AM 482793C		
			AM 246663C		
			AM 395963C		
			AM 395962B		
			AM 359088J		
			AM 166129K/32B		
			AM 280769K/70L		
			AM 280768J		
			AM 187237H		
			AM 190948J		
			AM 215883C/5E		
			AM 90180L		

[29] *Mr. Kirkpatrick:*

Any objection to that, John? That is a list of the numbers?

Mr. Duggan:

That he has identified?

Mr. Kirkpatrick:

That is the list he was testifying from.

Mr. Duggan:

We are only concerned with the numbers mentioned in the complaint. This is the entire list.

Mr. Kirkpatrick:

We are concerned with the whole group of bonds, and he has identified them. This is merely a question of putting the numbers on the record.

Mr. Miller, Sr.:

May we see that?

Mr. Kirkpatrick:

If the Court please, we offer in evidence as Plaintiff's Exhibit 3, a compilation by denomination and number, the Home Owners' Loan Corporation three per cent bonds, covered by the sheets which have been offered in evidence and received in evidence as Exhibit No. 2.

The Court:

It is admitted.

Mr. Duggan:

Are you through with the witness?

Mr. Kirkpatrick:

Yes, I am. Cross examine.

Cross Examination:

By Mr. Duggan:

Q. Mr. Frucholz, you have just identified a list of bonds with their identification numbers and all, that you say were purchased on different dates by your bank. Were these [30] bonds purchased for the bank itself, or were they purchased for the accommodation of the individuals mentioned in the order slips, and the remission to be made to the various purchasers?

A. The bonds were bought outright, similar to the way we buy series "E" savings bonds at the present time. People bring them to the bank, and we pay for the bonds.

Q. Were these various names that appear on these slips, were they customers of the bank?

A. I wouldn't know definitely. I recognize some of the names as being customers, and, of course, some of them I couldn't identify because they were bought at branches of the Bank of America, not at the office I am stationed at.

Q. Then would you be able to say, or would you say that when these purchases were made as detailed by you, and as reflected by these sheets, they were made by the bank simply as an agent for the various individuals?

A. No, I don't believe so. I think they were bought for the bank, they were incorporated in the bank's bond portfolio, and are listed there as bonds owned, until such time as they were sold again or some of them might have been retained if they were not called.

Q. Would you say that at the time these various transactions were completed, the bank was simply acting as an agent for the various individuals who were depositors of the bank?

[31] A. No, I wouldn't say so.

Q. Is there anything on your records to indicate they were outright sales by the various individuals to the bank,

other than as—other than being received by the bank simply as an agent?

A. No. This particular form shows that they were purchased, as distinguished from handled on a collection basis, through our collection department.

By Mr. Kirkpatrick:

Q. By the "particular form," you mean Exhibit 2, do you?

A. The Bond 21 form right here, which I have been shown a little while ago.

By Mr. Duggan:

Q. Was the money advanced to the various owners of these bonds by the bank, when the bonds themselves were surrendered to the bank?

A. The money was paid to the seller. It wasn't advanced, I would say. It was turned over to the man, the bank took possession of the bond, and it was the property from then on of the bank.

Q. Well, at that time, was not the bank acting simply as an agent for the various depositors whose names appear on the slips?

A. No, it wasn't.

Q. Do you have anything to indicate otherwise?

A. The bonds were shown on the general ledger account entitled, "Bonds owned," and this appears among the investment [32] portfolio and the financial statement of the bank, as "Bonds owned," and as such, it did not indicate that the bonds were held for anybody or advances had been made on the bonds.

Q. Do you have any record of the bank here with you showing that to be the fact?

A. I have the original general ledger sheets of the account entitled, "United States Bonds owned."

Q. Would that—

A. Which included all of these bonds in the total, as of the close of business on May 2, 1944.

Q. You say you have those ledger sheets here in court?

A. Yes, I do.

Mr. Duggan:

Do you have a photostat of them?

Mr. Kirkpatrick:

Yes.

Mr. Duggan:

May I see one?

By Mr. Kirkpatrick:

Q. Do you have the ledger sheet with you, Mr. Frueholz?

A. I have the originals here. It was copied for safety precaution reasons. These are the originals.

Mr. Duggan:

I don't have this marked as an exhibit. I want to ask the witness about them.

Mr. Kirkpatrick:

Will you mark them as an exhibit?

Mr. Duggan:

If it is all right with you.

Mr. Kirkpatrick:

I will give you a photostat.

Mr. Duggan:

Would you mark this as Plaintiff's [33] Exhibit whatever it is, being a general ledger sheet consisting of four photostat sheets?

(Sheets marked as Plaintiff's Exhibit No. 4.)

By Mr. Duggan:

Q. I show you your Exhibit 4, and which are photostatic copies of the original ledger sheets, which you say reflects the transactions concerning which you have just testified. Now, will you point out, on any one of those sheets, any one of the four, any single transaction that reflects the transaction in the bank that you have just testified to?

A. May I take a look at the original form of the Bond 21's?

(The Exhibit No. 2 was handed to the witness.)

A. Here is one form covering the purchase of $54,300 worth of these bonds, which were bought at the main office, the Los Angeles main office—that is where I am stationed —on April 28, 1944. We paid therefor, $54,300. This item appears as a charge of $54,300 on the postings of April 28, as a debit, and is included in the balance of bonds owned as of the close of business on April 28, in the total of $142,937.63.

Q. What happened on the original to the additional $80 that should be included in that entry?

A. You speak of accrued interest or what?

Q. I don't know what it is. You haven't told us that.

[34] A. I am not quite clear where I testified to $80. We paid $54,300 for it, and the par value of the bonds was $54,300.

Q. I believe you mentioned $53,480. Were you mistaken in connection with that?

A. I probably was mistaken.

Q. Maybe I am mistaken. I don't know.

A. The total should be $54,300.

Q. Now, how is there anything on this general ledger sheet to indicate any reference to these various bonds that were taken from the various depositors of the bank, that you have just given to us in detail?

A. There is nothing except that this was the largest purchase on that day, so the total could not have been included in any other entry on that particular day.

Q. Now here, you have quite a list of these various purchases, from various persons and various individuals, amounting, on different dates, to various amounts of money. Is there anywhere on that general ledger sheet, for instance, that you can identify the purchase of twenty-five three per cent H. O. L. C., 1944-52 bonds, from O. M. Morris?

A. There is nothing on the ledger sheet.

Q. Then that is not going to help us with the identification, is it?

The Court:

How is this important, Mr. Duggan?

Mr. Duggan:

Your Honor, I think it is very important, [35] because—

The Court:

I want to say this. I have permitted you now, some questions along this line, and I want to say this to counsel: We have had two pretrials of this case, and I understand, I think, what each one of you stated your position to be.

Mr. Duggan:

Yes.

The Court:

Nowhere did I hear, in any one of the pretrials, an issue as to whether or not this bank owned these bonds. I think for the purpose of this case, I am not going to permit much more along this line. This

man has testified that it is part of the investment portfolio of the bank. We are just wasting our time now, to find out whether any single record of the bank, one other record may show these bonds.

If the pretrial is going to mean anything, it means this: We will stick to the issue as set up in the pretrial and the pleadings of this case.

Mr. Duggan:

Your Honor, oftentimes at pretrial, you don't know what the testimony is going to be, and you don't know what the evidence is going to disclose. I was advised that these general ledger sheets reflected these various transactions that are shown on these individual sheets.

The Court:

Are you prepared to show that the bank [36] didn't own these bonds at the time?

Mr. Duggan:

No, sir.

The Court:

All right. If you would say you were, and some question about that, we would permit it.

Mr. Duggan:

We have no way of knowing that at all. But as I say—

The Court:

You didn't allege it in your answer. That is the point. It wasn't raised in the pretrial, and that is why we are going to stick to the issues in this case, as the Court understands it.

Mr. Duggan:

It wasn't alleged any where until just now, your Honor, and that is what prompted me—

The Court:

It was always alleged that they owned these bonds.

Mr. Duggan:

They may own them to all intents and purposes, but it looks very much as if they may have been just taken over by the bank as an agent for the various individuals.

The Court:

I understand your defense in the case, and I think I understand what the allegations are, and I have had twice now counsel for each side state their positions on the record. We can't spend a great deal of time on cross examination on irrelevant issues.

Mr. Duggan:

I don't intend to do that, as you well know, your Honor, but these things pop up in the testimony, [37] and we don't know about it until they do happen. That is the reason we wanted to inquire about them.

The Court:

You may proceed.

Mr. Casey:

As far as the defendant Rocco is concerned, your Honor, the first allegation of ownership was denied. If this bank is only a conduit of title, for the owner of the particular bonds involved, then, although this is somewhat in the nature of trover and conversion,

it is a possessive action, all right, but certainly there has to be some detriment on the part of the plaintiff here.

For example, I was going to question the witness—

By Mr. Casey:

Q. Do you have a branch bank at Toluca Lake, branch No. 411?

A. We have a branch at Toluca Lake. I am not sure whether 411 is the correct number.

Q. Here is a photostat of some part of Exhibit 2.

A. Yes.

Q. Now, that transaction could well be that the seller there is your branch bank to the home bank. Isn't that right?

A. Well, they indicated on the slip here that the seller's name was Harlan Pauley.

Q. You indicated on there that the seller is Toluca Lake branch No. 411. And then in parentheses above it is some name. Is that right?

A. That is right.

[38] Q. You don't know whether that was put in afterwards or how the original slip was involved, do you?

A. It is written in the same handwriting. I presume it was written by the same person.

Q. But maybe not at the same time. Is that right?

A. I don't know. I wasn't there, sir.

Q. That could be a transaction between the branch bank and the home bank, couldn't it, for convenience of some third person?

Mr. Kirkpatrick:

If your Honor please, I object. What difference does it make whether it is between the branch bank

and the home bank? It is still one and the same bank. They owned the bond.

The Court:

The point of the matter is—I don't know whether Mr. Casey—I guess Mr. Casey was not at the second pretrial, but I intend in these pretrials, I say this to counsel in this case, to formulate the issues at pretrial. I have regard, of course, to the pleadings, the complaint and the answer. All I am suggesting to Mr. Duggan and to Mr. Casey is that this witness having testified as to ownership in this plaintiff, the question of some extensive cross examination as to whether one record might contradict another record is not in issue in this case. Let's get on with something that is in issue. That is all. In view of his testimony.

Mr. Casey:

I agree that if the witness is testifying [39] that the bank owned these bonds—my only purpose in cross examination, and I got the idea somewhere here, that it might have been for convenience of a a customer. And therefore, the ownership of the bonds remained in the customer, and not in the bank.

The Court:

Are you in any different position than Mr. Duggan, to show that it was otherwise?

Mr. Casey:

No, I am not, sir.

The Court:

All right. Proceed.

Any further cross examination?

Mr. Duggan:

No, your Honor. I bow to your Honor's suggestion.

The Court:

All right.

Mr. Kirkpatrick:

I think that is all of this witness, your Honor.

The Court:

All right. Call another witness.

Mr. Kirkpatrick:

We will call as witness Miss Lillian B. Britton.

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[40] LILLIAN BURR BRITTON, called as a witness on behalf of the plaintiff, having been duly sworn, testified as follows:

Direct Examination:

By Mr. Kirkpatrick:

Q. Would you state for the Court and the members of the jury your full name, please?

A. Lillian Burr Britton.

Q. Where do you live, Miss Britton?

A. I live in Los Angeles, California.

Q. By whom are you employed?

A. I am employed by the Bank of America.

Q. Were you employed by the Bank of America on May 2, 1944?

A. Yes, I was.

Q. In what capacity?

A. I was a stenographer, secretary.

Q. For whom did you work?

A. I worked in the securities department, for Mr. Goodrich.

Q. What is Mr. Goodrich's full name?

A. W. H. Goodrich.

Q. On that day, that is on May 2, 1944, did you have in your possession certain bonds of the Home Owners Loan Corporation?

A. Yes, I did.

Q. Where did you have them that day?

A. Well, I received them as an assignment, from the double [41] custodian, to get them ready to go to the Federal Reserve Bank for payment.

Q. Would you try to keep your voice up, please?

A. Yes, I will.

Q. You have referred to the fact that you received them from the double custodian. Would you tell the Court and the jury what was the procedure employed by the bank at that time, with respect to the custody of bonds?

A. Well, it is the same procedure now. Two people are required to have separate keys to our custody truck. It takes two people to open up the truck and get valuables out of it. That is where valuables are kept. And by the double custodians, I mean the two people who had access to the truck, got the bonds out, and gave them to me to work on.

Q. Do I understand you then that when the securities come in to the department in which you are employed, they come in in a truck, from which articles can be removed only by two people? Is that correct?

A. That is correct. That is right.

Q. How do they remove them?

A. Each one takes a key and opens the lock that it fits and opens up the drawer.

Q. Who are those people? Are they designated employees?

A. Oh, yes, they are designated by senior officers.

Q. Now, on the day in question, that is on May 2, 1944, did [42] you receive from the truck, you have just described $100,225 of Home Owners Loan Corporation bonds?

A. Yes, I did.

Q. What were you to do with those bonds?

A. I was supposed to list them on a special Treasury Department form, in order for them to go to the Federal Reserve Bank, so the bank could get—our bank could get payment from the Federal Reserve Bank.

Q. Did you hear the testimony of the previous witness, Mr. Frueholz?

A. Yes, sir.

Q. Can you tell the Court and jury whether or not the bonds which you had in your possession that day were the same $100,225 of bonds that were identified by the witness, Frueholz?

A. Yes.

Q. Now, how do you establish that fact?

A. Well, it is our bank operation, when any branch purchases U. S. bonds, they prepare a record of that purchase on this bond 21 form, and it shows the date the bond was purchased and the name and address of the person they bought the bonds from, and the amount of money that they paid for them. And then—

Q. Pardon me. Are you referring to the documents that have been introduced in evidence as Exhibit 2, which I now show [43] you?

A. Yes. That is the bond 21 form that we always make up when we buy U. S. Government bonds.

Q. Did you have the documents which now make up Exhibit 2 in your possession on May 2, 1944?

A. Yes, I did.

Q. And you also had in your possession the bonds described in those forms. Is that correct?

A. Yes. These tickets were attached to the bonds. You see, as each group of bonds was purchased, this ticket was attached to it. So they were given to me, the tickets attached to each—to the bonds.

Q. I see. When the bonds were given to you, one of those tickets would be attached to each particular bond or group of bonds. Is that right?

A. That is right, yes, as purchased by the branch.

Q. Then what were you to do with the bonds?

A. Well, I was supposed to list them on the Treasury Department form, but in order to make sure that I had all the bonds, my only method of accounting was to take each group and verify that the bonds that I had were the bonds that were shown by this ticket. Then I separated the tickets from the bonds, because I was going to type up my Treasury Department form, from the actual bonds. And then when I finished that form, of course, I would balance to these [44] tickets. This was my only way of accounting, balancing, to make sure that I had all the bonds.

Q. Now, let's see if I understand you. You first detached the bond 21 form.

A. No. I checked the bonds first.

Q. You checked the bonds.

A. I wouldn't detach—

Q. You checked the physical bonds with the number shown on that form.

A. Yes.

Q. Then did you detach that form from the bond?

A. Yes. Then I detached them.

Q. Then you started to prepare, did you, or you were going to prepare a form or a letter, sending those bonds on to the Federal Reserve Bank for payment. Is that correct?

A. Well, that was the next step, but of course I was supposed to go to lunch then, so I—

Q. When did the bonds first come into your possession, Miss Britton?

A. Well, I got them earlier in the morning. I don't remember the exact time. But it was sometime in the morning.

Q. And how far had you gotten with your work before you went to lunch? You mentioned having gone to lunch.

A. I had verified the bonds against each bond 21 form and detached these, and I had clipped a few May 1 coupons that [45] had to go through another department, and I had separated those, and so when I went to lunch I bound them all up and gave them back to the double custodian to put into the truck.

Q. Did they go back into the truck?

A. Oh, yes.

Q. Did you see them then?

A. Yes.

Q. Then you went to lunch?

A. Yes.

Q. When did you return from lunch, approximately?

A. Well, as I recall, it was around twelve o'clock that I came back from lunch.

Q. What did you do when you got back from lunch?

A. Well, I went to the double custodians to get the

bonds, because I was going to finish listing them. That is, I was going to make the—finish my job.

Q. And where did you put the bonds, when you brought them back?

A. I put the bonds on my desk. I was ready to start to work on them.

Q. And then will you tell us what happened after you put the bonds on your desk?

A. Well, among my other duties in the department, I was supposed to wait on people at the counter, and a man came to the counter and I went over to see what he wanted. And immediately after that, another man came to the counter and [46] asked me a rather foolish question, I thought at the time. And I kept noticing that he was looking over my shoulder, and I of course couldn't turn my back on him, but he asked me this same question three times, and he wouldn't look at the piece of paper I was showing him, where to sign his name, and then as soon as he left another woman came and asked a rather simple question, and I went back to my desk, and the bonds were gone.

Q. What did you do then?

A. Well, I asked the other employees who were sitting there if they had taken them, by any chance, since I had been interrupted in my work, and they hadn't. And we made a thorough search of the department, and notified the authorities.

Q. Whom did you notify, if you know?

A. Well, that was left up to the senior officers. They notified whoever was the proper people.

Q. To your knowledge, did the bank ever locate any of these bonds?

A. Not at that time.

Q. Well, did it ever locate any of them in the bank?

A. No.

Q. Coming now to the $57,000 of bonds which are involved in this suit, as distinguished from the whole $100,225, do you know whether or not the bank ever did locate any of the $57,600?

[47] A. No, they didn't.

Q. Are you still in the employ of the bank, Miss Britton?

A. Yes, I am.

Q. You indicated that in May of 1944 you were employed as secretary to Mr. William H. Goodrich. Is he still employed by the bank?

A. Yes, sir, he is. He is—

Q. Has he been in the bank recently?

A. No, he has been quite ill.

Q. How long has it been since he has been in the bank?

A. Since before May 15.

Q. Of—

A. 1954. This year.

Q. '54. But prior to that time, he continued in the regular employ of the bank, from May 1944 up until his illness in May of 1954?

A. Yes. Well, he is still considered an employee of the bank, even though he is home sick.

Q. Do you know whether or not he has been confined to the hospital?

A. Yes, he has been in the hospital twice since May.

Q. Do you know whether or not he is able to travel?

A. I know he isn't. If he could, he'd be here.

The Court:

We will take a ten minute recess.

(A recess was taken at this time.)

[48] Q. Miss Britton, can you tell us whether or not you knew these bonds had been called for redemption? Whether you knew on May 2, 1944, that the bonds you have identified had been called for redemption?

A. Yes, I knew that.

Q. Is that the reason you were sending them to the Federal Reserve Bank, for payment?

A. Yes. that is true.

(Document marked as Plaintiff's Exhibit No. 5.)

Mr. Kirkpatrick:

May it please the Court, the plaintiff offers in evidence as Plaintiff's Exhibit 5 a photostatic copy of the official notice of call for redemption of these bonds of Home Owners Loan Corporation, three per cent bonds, 1942-52 Series A.

Mr. Duggan:

No objection.

The Court:

It will be admitted.

Mr. Kirkpatrick:

You may cross examine.

Cross Examination:

By Mr. Duggan:

Q. Miss Britton, I understand we are having a little trouble being heard. I am going to get over here and talk to you, and then maybe they can all hear you.

You described just a few moments ago, before the recess, what had occurred just prior to the time you went to lunch, and when you came back. And you told us about these [49] bonds being on a truck, under double custody.

Do you mean that there were two other employees of the bank, each of whom had a key, that it would be necessary to use to unlock this truck?

A. Yes, sir.

Q. To unlock the vault?

A. That is correct.

Q. Speak up.

A. Yes, that is correct.

Q. You have come a long way to be heard here. Do you know the names of those employees?

A. At that time, yes. One was Mrs. May Viola Crutcher. She has since retired from the bank. And the other was Mr. Jack Price; John F. Price was his full name. And he is no longer with the bank.

Q. You told us before you went to lunch these bonds were delivered to you and you checked over them, and then you removed these slips, and then you handed them back to these two employees for the purpose of locking them up again. Is that correct?

A. During the time I went to lunch, yes.

Q. And then when you came back from lunch, they unlocked this vault that was on a truck, and you got possession of these same bonds again.

A. Yes, that is correct.

[50] Q. Let me ask you this. You didn't say, and we'd like to know, when you got back did you check the bonds again to see that they were all there and in the same condition as they were when you left?

A. They were in the same condition in which I gave them to the custodians, because I bound them up with a rubber band, and I attached the coupon envelope and the little forms all with it. It was all in one package. They

didn't do anything but put it in the truck and take it out and hand it to me.

Q. Well, it wasn't wrapped or sealed particularly?

A. No.

Q. And you didn't check them after they came back, after you came back from lunch?

A. Against the bond 21 forms?

Q. Yes.

A. It wasn't necessary. I had already verified them.

Q. Now then, I am sure we would all be interested—you have told us about some man and some lady coming up and asking you some rather simple questions, and looking over your shoulder. Can you give us some idea of how this banking room where you worked was arranged? Were there counters, like there are in the ordinary bank, or did you just have a desk outside?

A. Oh, we are behind a railing, that is about as high as this. And it is on a raised platform, just about like that. Of [51] course, it is all—it was all enclosed by the rail, and there were the various desks behind this enclosure.

Q. Now then, in addition to the rail that you have mentioned, being on a platform, above the rail were there any, what we might call cages, with windows like we see in the ordinary bank?

A. No.

Mr. Kirkpatrick:

I object to that, your Honor. There is no testimony that you see cages like that in ordinary banks.

The Court:

He is simply asking about cages.

Q. In other words, it was just open back of this railing that you have described.

A. At that time, yes.

Q. Well, of course that is the only time we are interested in, Miss Britton.

Q. And you had these bonds on your desk, inside of this railing?

A. My desk was back against the wall. My desk wasn't along the railing.

Q. Well, these people that you talked to—let's assume that the desks were back of a railing similar to this (indicating jury box). On what desk did you put these securities, these bonds?

A. Well, my desk was back against that wall (indicating).

Q. How far back from the railing would your desk be?

[52] A. I am not much of a judge of distance, in feet.

Q. Can you just by some indication here in the room give the jury some conception of it?

A. Well, our platform is wider than that, but it is not as wide as this, from here to there.

Q. Well—

A. I don't know. They measured it, I suppose, at one time. I couldn't tell you how many feet away from the rail it was.

Q. Let me ask you this. It was back far enough that no person could reach across that rail.

A. Oh, yes.

Q. And touch your desk.

A. We never put anything along the rail.

Q. Speak up, please.

A. I'm sorry. It wasn't next to the rail. No. I was back against the wall.

Q. In other words, your desk or the package couldn't be reached by anybody outside of that rail.

A. That is right.

Q. And so far as you know, nobody was in behind that rail, on that particular day, from the time the bonds were turned over to you until they appeared missing, showed up missing.

A. The only indication was this man that I was talking to, that acted so suspiciously.

Q. Yes, but he was at all times outside of the rail.

[53] A. He was outside the rail, yes.

Q. There was nobody back of the rail, other than the employees of the banking institution.

A. Authorized personnel, yes, as far as I knew.

Q. And suddenly you looked around and the package had disappeared.

A. That is right. I went back to my desk, to work on on the bonds, and they were gone.

Q. Did you at any time ever see anybody, on this particular date, back of that rail, other than the regular employees of the bank?

A. Yes. There was one man sitting at one of the—one of the desks, who was not an employee of the bank. He was a customer of the bank.

Q. Oh, well, he was a customer?

A. Yes.

Q. I see. But you knew who he was?

A. Oh, vaguely, I suppose. I don't—

Q. Ma'am?

A. Vaguely, I suppose. I don't remember now.

Q. Nobody but a customer or somebody that was well known to the bank could get in there?

A. That is right.

Q. That is what I am asking, Miss Britton.

A. Oh, yes. That is right.

[54] Q. How long would you say it was from the time you got back from your lunch, to the bank, and again took possession of this bundle of securities, until you discovered it was missing?

A. You mean the inclusive time, from the time I returned from lunch to the time the bonds actually were missing?

Q. Yes. About how long?

A. Well, the—it was about twenty minutes. Of course that covers the time, from the time I returned from lunch, got the bonds, put them on my desk, and then went over to the counter to talk to these people. And then when I turned around and they were gone.

Q. And they were gone. This Bank of America is perhaps the largest banking institution in the United States, is it not?

A. Yes.

Q. And it has quite a number of branches throughout the State of California?

A. Yes, it has.

Q. These two people that you say asked you these foolish questions, at no time were they on the inside of that rail, where the employees of the bank were engaged in their various duties?

Mr. Kirkpatrick:

If your Honor please, I object to that question. I think the testimony was that three people—

Mr. Duggan:

All right, we will make it three. I thought it was two.

[55] Q. Your best recollection.

A. I didn't see them go behind the rail.

Q. Well, if any stranger had gone back there, it would certainly have attracted your attention.

A. I had my back to my desk. I was waiting on these people, this man that kept asking me these questions.

Q. But to get—you were between your desk and the rail.

A. Yes.

Q. And the person that was asking you the questions was outside of the rail?

A. Yes.

Q. So in order to get to your desk, he would have to get inside the rail and pass by you, would he not?

A. No. Anybody could go in through the entrances. There were two entrances, to the department. You didn't have to pass me to get to my desk.

Q. Do you mean that anybody at all could go back of that rail, without some employee knowing about it?

A. Well, apparently somebody did.

Q. Apparently somebody did. I think that is all, Miss Britton, thank you.

Mr. Casey:

Just a moment, please.

By Mr. Casey:

Q. You say that you made a search of your department?

A. Yes.

[56] Q. What did you do, after you came back from the counter and found that the bonds were not on your desk where you placed them?

A. As I recall, the first thing was quite a shock, and I went to each employee, to see if they had taken the bonds, to finish working on them because I had been interrupted. They didn't have them. And—

Q. How many employees did you go to?

A. There were two—let's see. I can't remember whether Mrs. Crutcher was there at the time, because her desk was back in an enclosed portion, but there were two girls sitting out on the same platform with me, at that same time, and I asked both of them.

Q. And had they been—they were employees of the bank?

A. Oh, yes.

Q. And were they sitting at their desks, near yours, when you went over to the counter?

A. Yes.

Q. And they were still there when you went back?

A. Yes.

Q. And did you make any other search?

A. Oh, yes. We searched every place. We searched—well, whenever anything is—we looked in all the drawers, all the trucks. We made a complete and thorough search and then, of course, our inspectors from the bank came down [57] —immediately they were notified, and they made a thorough search, and everybody—

Q. You looked in the desk drawers?

A. Oh, yes.

Q. In your desk, and around on the floor?

A. Oh, yes.

Q. In the immediate department of which you speak, how many employees were there there, bank personnel?

A. When?

Q. After your lunch hour, on May 2, 1944.

A. After my lunch hour. Myself, two clerks, and a vice president was sitting along the rail. And Mr. Price was out to lunch. And—I don't recall any more. That is about the sum and substance of the department.

Q. How many desks were back in this enclosure behind the railing?

A. In previous cases, they have had pictures. There have been various changes in the department over the last ten years, and if I give something just from my recollection, will that be all right?

Q. That will be all right.

A. How many desks were behind that rail in that particular section?

Q. Yes.

A. Five. But of course that doesn't comprise the whole [58] department.

Q. That is what I want to know.

A. You want to know the whole department?

Q. Separated by various railings.

A. All right. Then there was Mr. Goodrich's desk, in addition, and then Mrs. Crutcher's desk, who was the double custodian, who was behind a partition.

Q. And was this place in the bank, where your desk was located, was that in a general part of the bank itself?

A. Well, I was separated by a rail, and in a cubicle. That is the only way I can describe it. When you are in a bank, you've got rails all around you. Of course—

Q. Was this the main banking room?

A. We are in the main lobby. Yes, we are in the main lobby.

Q. Was there any other work to be done on these bonds? I thought when you had completed your work they would go then to their destination.

A. That is right. When I finished listing them on the Treasury Department form, then they would be prepared to go to the Federal Reserve Bank, bundled, packaged, or whatever we did.

Q. Now these other two girls, girl employees at the bank, were their desks anywhere near the entrances from the main lobby?

A. My desk was closest to the—repeat that. What do you mean?

Q. Well, you said there were two entrances through the railing, from the door, or from the street entrance.

[59] A. Well, no. Not from the street, I didn't say. There are two entrances to the department, but only one that leads out into the main lobby.

Q. Where the customers are?

A. That is right.

Q. Where does the other one go to?

A. Into the back banking section.

Q. Where other employees are?

A. That is right.

Q. Now, with reference to the one entrance through the railing, from the public lobby of the bank, where the customers are, to get to your desk would any one have to pass where these other two girls were?

A. No.

Q. Was your desk first?

A. That is right.

Q. And how close to your desk were these other two girls?

A. Oh, dear, I can't tell you in feet.

Q. Was it close by? Did you work at arm's length, as close as Mr. Duggan and I are?

A. No. No. I would say that my desk would have been about here, my typewriter here. There would be that much space, and then the other desk would have been as far away as that desk, but back. Not adjacent to my desk. It was back in the center of the department, a few feet.

[60] Q. That is indicating the clerk's desk here in court?

A. That is right, yes.

Q. That would be about six or seven feet?

A. That is as close as I can come to it. That was one of the desks. The other desk was in the back part of the department, oh, maybe as far as that table is, in distance, and it was facing against the wall. That girl faced the wall. She didn't look out into the lobby.

By Mr. Duggan:

Q. Miss Britton,—pardon me. I don't want to annoy you, but I just do want to ask you one or two other questions.

Mr. Kirkpatrick:

If your Honor please, I haven't objected to this line of questioning, but I do not see the relevancy of it. And I won't object, but I would request that the Court instruct the jury that we are not concerned in this case in determining who took these bonds.

The Court:

We are not going to give that instruction at this time, Mr. Kirkpatrick. They are cross examining

the witness on the evidence presented here in chief, as to the disappearance.

Mr. Duggan:

I will be very brief, your Honor. Just two or three questions.

The Court:

Let's not be repetitious.

Mr. Duggan:

No, sir. Thank you.

Q. Miss Britton, you told us a little bit ago about a customer, [61] a stranger who also was inside the rail. Was he being interviewed at the time you first noticed the disappearance of these securities?

A. I beg your pardon?

Q. Was this customer of the bank, who you have just told us was inside the rail at one of the desks, was he being interviewed by an employee of the bank, at or about the time you missed these securities?

A. He was present. He came into transact some business, as far as I know.

Q. I understood that is what—what I am getting at, was he engaged in conversation with another employee of the bank, at the time you first became aware that these securities were missing? This stranger?

A. I can't remember whether he was there exactly—he was there at some time. Whether he was there when I returned to my desk, I can't remember right now. He sat there a long time and talked to Mr. Kelly, and Mr. Kelly was on the phone part of the time, and part of the time he was transacting his business. I can't tell you now.

Q. That is all right. I am not expecting the impossible. Who was Mr. Kelly, Miss Britton?

A. Mr. Kelly was a vice president. He retired and he died a few years ago.

Q. And this stranger—I mean he was a stranger so far as he [62] was not an employee—he was in there, engaged on a business transaction with Mr. Kelly, the vice president of the bank?

A. That is right, yes.

Q. How far away was Mr. Kelly's desk from yours? Tell us about how far?

A. Oh, about the same distance. I mean all the desks are the same width from the rail, so it would be about the same distance.

Q. Six or seven feet?

A. I guess so.

Q. That is all. Thank you very much.

By Mr. Casey:

Q. What were your duties? I didn't ask you that. What did you do at the bank?

A. At that time I was being trained for everything. I did filing, I typed forms, I took dictation, I typed letters, I waited on the counter. I did whatever was—whatever they wanted me to do.

Q. That is all.

Re-direct Examination:

By Mr. Kirkpatrick:

Q. Just a minute, Miss Britton. The other girls in the department, to whom you have referred in the course of your testimony, did they have anything to do with the bonds, in processing them for forwarding to the Federal Reserve Bank?

[63] A. I can't tell you if they did. It's been—whether they handled the bonds, I wouldn't know.

Q. Let me ask you this question, Miss Britton. Was it your job to do the work which needed to be done in order to forward these bonds to the Federal Reserve Bank?

A. Yes, that is right. That was my assignment that morning. The bonds had been called, as of May 1. We had all these bonds, and they had to go to the Federal Reserve Bank for payment. So they gave them to me to list on the form.

Q. Now, would it have been proper for any of those other girls to remove the bonds and to undertake the work which you were doing?

Mr. Dulgan:

That is objected to, your Honor.

The Court:

Well, she did it. She has testified she did it, as I understand.

Mr. Kirkpatrick:

The point is, your Honor, I think there is some inference from some of the questions asked that perhaps some of the other employees—

The Court:

You can't button up every detail, Mr. Kirkpatrick. Don't worry about it.

Q. Do you know whether or not, Miss Britton, any charges were ever made against any one in the bank, charging the taking of these bonds, any employees of the bank?

Mr. Casey:

That is objected to.

Mr. Dulgan:

That is objected to.

[64] *Mr. Kirkpatrick:*

Your Honor, these people have inferred that this was perhaps an inside job. I think I am entitled to show that the case was extensively investigated, and that no charges were ever brought against any one in the bank.

Mr. Casey:

If the Court please, this witness testified that she went and asked the other employees, and went to the double safety truck to find out, looked in the drawers to see whether any one else had done any other work on them. She is the one who testified. There is no inference.

Mr. Kirkpatrick:

Questions were elicited on cross examination. It was gone into fully, your Honor.

The Court:

I understand she has testified she is still employed there.

Mr. Kirkpatrick:

That is correct.

The Court:

Objection sustained.

Q. Were you interrogated at any time by federal authorities or others, after the loss of these bonds, and in connection with the investigation of the loss, Miss Britton?

Mr. Casey:

That is objected to as irrelevant and immaterial to this issue.

The Court:

I think that is a valid objection. We will sustain the objection.

(Photograph marked as Plaintiff's Exhibit No. 6.)

Q. Miss Britton, I show you a photograph which has been marked [65] for identification as Plaintiff's Exhibit 6. You have testified regarding the location of your desk. Will you look at the exhibit and tell me if you can identify the photograph?

A. Yes, I can.

Q. Is that a photograph of the office of the bank and in particular the portion of the office where your desk is located?

A. Yes, that is correct.

Mr. Duggan:

Let me see it.

(Exhibit handed to counsel.)

By Mr. Duggan:

Q. Is your desk indicated in this photograph, Miss Britton, please?

A. My desk was right here.

The Court:

Just a minute, Mr. Duggan. Mr. Kirkpatrick still has the witness.

Mr. Duggan:

I beg your pardon. I thought you were through.

Mr. Kirkpatrick:

No.

The Court:

We want to keep it orderly and let one fellow finish before the other fellow takes over.

Mr. Duggan:

Your Honor, I thought he was through. I beg your parton.

[66] *By Mr. Kirkpatrick:*

Q. Miss Briton, so that we will not be confused, would you take this photograph and take my pen and just put an "X" where your desk is located there?

A. (Witnessmarked exhibit.)

Q. Would you step down and show the jury, Miss Britton, from this photograph, the counter to which you have referred, that you were at the counter when these people called?

The Court:

Are you introducing that?

Mr. Kirkpatrick:

Yes, I will.

The Court:

You had better introduce it and see whether there is any obection.

Mr. Kirkpatrick:

We offer in evidence Plaintiff's Exhibit 6.

Mr. Duggan:

No objection.

The Court:

It is admitted. You may show it.

By Mr. Duggan:

Q. Where is it?

The Court:

Speakup, Mr. Duggan. We have nothing off the record.

Mr. Duggan:

I was trying to get the mark that Miss Britton was asked to put on located on the photograph. I confess I can't see it. She is going to show it to the jury and I don't want to have any mistake about the location.

Mr. Kirkpatrick:

Did you find it?

[67] *Mr. Duggan:*

No, I can't see it.

A. I nearly covered up the whole desk with the "X".

Mr. Duggan:

You point it out.

Mr. Kirkpatrick:

Perhaps, your Honor, we could make it clearer by having her put an arrow pointing down to the desk, on the white portion of the photograph.

The Court:

That might be better.

A. (Witness marked exhibit.)

Mr. Duggan:

Now we are getting somewhere.

By Mr. Kirkpatrick:

Q. Now Miss Britton, will you come to the members of the jury?

A. (Witness went before the jury box.)

Q. Calling your attention, Miss Britton, to the marble counter in the foreground of the picture, is that the counter to which you referred when you spoke of having been called to the counter by customers?

A. Yes, that is right.

Q. Calling your attention to the arrow, which has been placed a little to the right of the picture, as you face it, does that arrow indicate the location of your desk?

A. Yes, that is right. My desk was sitting right up against the wall, end wise.

By Mr. Duggan:

Q. What was that answer? It was up against the wall, end wise?

A. That is right.

[68] *Mr. Kirkpatrick:*

That is all the re-direct examination.

Mr. Duggan:

We have no further examination. Thank you very much.

Re-cross Examination:

By Mr. Casey:

Q. Can you locate Mr. Kelly's desk, Vice President Kelly's desk, on that photograph?

A. I will, if you wish.

Q. Is it shown there?

A. I believe so.

Q. Miss Britton, as you face the photograph, Exhibit 6, there shows in the right center the arrow which you have placed there as being your desk. Now, will you place an "X" on the white background, the light background there, where Vice President Kelly's desk was?

A. His desk was along the rail. I can't put an "X" up on the wall. His was down right along the rail.

Q. You are indicating a desk in the exact center of the

photograph. Would you say that that was Mr. Kelly's desk?

A. Yes. That was Mr. Kelly's desk.

Q. Now, will you put then on the floor of the bank an "X"?

A. (Witness marked exhibit.)

Q. And the desk is right opposite that in the photograph?

A. Yes. Right above it.

Q. You say right above where you have placed the "X" is where [69] the vice president's desk was?

A. That is right.

Q. Along the rail?

A. Yes.

Q. That is all, thank you.

Mr. Kirkpatrick:

No further questions, Miss Britton. You may be excused.

(Document marked as Plaintiff's Exhibit No. 7.)

The Court:

Anything further?

Mr. Kirkpatrick:

I have a number of notices, your Honor, covered in pretrial, that I want to put in.

The Court:

It is five minutes to four. Perhaps we had better adjourn.

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[70] MORNING SESSION.

Tuesday, October 12, 1954
10:00 A. M.

Mr. Kirkpatrick:

If the Court please, I issued a subpoena in this case, directed to Mr. Kossin, K-o-s-s-i-n, of the Federal Reserve Bank. He informs me that the testimony in which I am interested would more properly come from a Mr. Foster. I am therefore willing to release Mr. Kossin from the subpoena and substitute Mr. Foster, which I understand is agreeable to Mr. Harrison.

Mr. Harrison:

Yes.

The Court:

All right. That may be done.

Mr. Kirkpatrick:

May it please the Court, at the conclusion of the session yesterday, I excused the witness, Britton, and was in the process of identifying certain documents.

I understood from Mr. Casey, however, at the end of the day, that perhaps he would like to have the witness, Britton, re-called. And she is in Court, and if he would like to ask further questions—

Mr. Casey:

If I may, please.

Mr. Kirkpatrick:

Miss Britton, would you take the stand again, please?

[71] LILLIAN BURR BRITTON, a witness on behalf of the plaintiff, having been previously sworn, was re-called and further testified as follows:

Cross Examination (Continued):

By Mr. Casey:

Q. On Exhibit 6, that is the picture of the banking room, you have identified Mr. Kelly, the vice-president's desk, and your own desk. Would you tell me where those entrances of which you spoke in your testimony yesterday are located?

A. The one entrance to the outside street is right there behind my desk.

Q. The entrance to the outside street, that is to the—in the proximity of a doorway there?

A. That is true. However, you have to pass through the cubicle where Mr. Goodrich's desk is. Then there is a swinging gate that leads to this door, which goes into the building elevator lobby, out onto the street. There is also an entrance to the street out here. You can't see.

Q. To the left of the picture?

A. That is right.

Q. But the only door shown in the picture is the door leading to the elevator lobby of the building?

A. That is right. But that's right next to the street entrance.

Q. So Mr. Goodrich's desk then, was in that cubicle?

A. That's right.

[72] Q. Just in front of that door, as it is shown in the picture, although not so situated, actually.

A. That is correct.

Q. Where were you with reference to the counter?

A. I was at the counter between Miss Keller's desk and Mr. Price's desk.

Q. And Mr. Price's desk, you indicate the desk at the extreme right of the picture, and Miss Keller's as being next to that.

A. From what I can tell from the picture, I believe that was the case then. There is a partition right here.

Q. At twelve o'clock noon, on the day in question, in 1944, other than the ones who were out at lunch, the regular bank personnel were occupying their desks, and business was being carried on in the regular way in the bank?

A. That is true.

Q. That is all.

Mr. Duggan:

Mr. Casey, may I suggest that you have the witness—or Mr. Kirkpatrick—explain that to the jury? Do you think you ought to?

Mr. Casey:

We will do that later. That is all.

Re-direct Examination:

By Mr. Kirkpatrick:

Q. Miss Britton, so that we may understand, who was in or near [73] your office at the time this transaction occurred? That is about twelve o'clock on May 2. May we review for a moment who those persons were that you have made reference to? Now, Mr. W. H. Goodrich, he was your superior, wasn't he?

A. That is right.

Q. He was in charge of the department?

A. That is true.

Q. Where was he at the time, at about twelve o'clock, when you were called to the counter?

A. Mr. Goodrich was on his way out to lunch, and he was out to lunch at the time I was at the counter.

Q. Now, you mentioned a Mr. J. F. Price, who was one of the custodians during that day, as also normally being there. Was he in the office at the time you went to the counter at twelve o'clock?

A. Well, I didn't go to the counter at twelve o'clock. It was shortly after that. Mr. Price gave me the bonds, of course, when I returned from lunch, and then he went out to lunch. Because I went to the counter and some one asked for Mr. Price, and I looked at the clock, because Mr. Price was out to lunch. That is how I establish the time. He was out to lunch at the time I was at the counter.

Q. So two of the people who would normally be there, those two were out to lunch, namely Mr. Goodrich and Mr. Price?

A. That was their regular luncheon schedule, as I recall.

[74] Q. Of course, you said that you were there also, and that you went to the counter. How long were you at the counter, approximately?

A. Long enough to talk to those three people, but I can't tell you right now the time. They timed me when I was making my statements right after the theft.

Q. Would you think it was three minutes?

Mr. Duggan:

Wait a minute. That is rather leading, Mr. Kirkpatrick. The witness has given you a fair answer. I don't think you ought to put the time in her mouth.

The Court:

I think we have been over this, in any event.

Mr. Kirkpatrick:

I thought there was some confusion, perhaps, your Honor, as to just how long she was there.

The Court:

It is for the jury. I think she was cross examined on it. Examined in chief and cross examined.

Q. You also mentioned, Miss Britton, a Miss Todd. Where was she at the time?

A. She was sitting at her desk, facing the wall. Whether she was on the telephone at the time, I can't remember exactly.

Q. You also mentioned a Marguerite Keller, I think. Where was she?

A. She was sitting at her desk, along the rail, and telephone calls were made to her, so that she was occupied on the telephone during that time.

[75] Q. You mentioned a Mr. Kelly.

A. Mr. Kelly was at his desk. He was quite elderly and very hard of hearing, and he was on the telephone, I think, for the greater portion of the time.

Q. Now, were there any other bank employees in that immediate vicinity at the time?

A. As I recall from the investigation made, one messenger girl came in—

Mr. Duggan:

No, no. Not from any investigation.

A. I am sorry.

By Mr. Duggan:

Q. From your own knowledge.

A. I might say then, if I recall correctly, from the questions put to me at the time—

Q. Well, still I—

A. I'm sorry.

Q. Give your own recollection.

A. I didn't see the messenger girl bring the telegram. I'm sorry. I didn't see her bring the telegram. I simply knew she brought it. I'm sorry. That is all I know.

Mr. Kirkpatrick:

I have no further questions.

Re-cross Examination:

By Mr. Duggan:

Q. Miss Britton, I don't want to keep you too long. Would you step down here? This is Exhibit 6, that you have [76] identified, at least, as a section of your building. Would you step up to the jury? I want to ask you a question.

A. (The witness went before the jury box.)

Q. About how far would you say it is from the railing that is shown from the front of this picture, to your desk which is in the rear of the room, against the wall?

A. Well, it is pretty hard for me to judge in feet.

Q. Just your best judgment, Miss Britton. We don't expect you to be exact.

A. I have to measure distances by comparing—

Juror No. 3:

Would it be as close as this wall?

A. No, it was further.

The Court:

The rail is thirteen and a half feet long. That might give you a start.

Q. This is thirteen and a half—

Juror No. 3:

Would it be as close as this wall—

The Court:

Members of the jury will listen to the testimony, please. Just listen to the testimony.

A. Well, let's see. I would say that it was—my desk might have been here, and the rail would have been over to the end, there.

Q. That would probably have been twenty feet or more. Would you say that?

A. Of course, how wide is the desk? I don't know how much space the desk takes up. I'm sorry, but I'm no good on feet [77] and distances.

Q. We are not going to try to embarrass you. You understand that.

A. I know, but I want to help.

Q. We understand. Would it be as far as from where you are standing to the rail inside the courtroom?

A. Approximately, yes.

Q. The jury can see that for themselves. In other words, anybody standing outside the rail would be as far as from where you and I are standing to that rail, away from your desk. Of course, the width of the desk would be taken out of that.

A. Yes, it seems pretty wide, but I can't tell.

Q. All we are asking is your best judgment.

A. All right. That is as far as I can go, I guess.

Q. In other words, those bonds were on that desk, over against that railing.

A. No.

Q. On your desk?

A. My desk. My desk was against the wall. My desk wasn't along the rail.

Q. No, I mean—

A. Excuse me, you are wrong.

Q. Your desk was against the wall?

A. Yes.

[78] Q. The railing was out where we are standing?

A. All right.

Q. I want you to tell me. I was never in the bank. You tell me—listen—you know I'm not trying—

A. This is my desk, against the wall.

Q. That is right.

A. If this is where my desk is sitting, this way—

Q. Let's put it this way. Your desk is sitting out where that chair is.

A. That is backwards the way I sit in the bank, so I can't judge the distance as well, unless I do it the way it was.

Q. You do it the way you want to, Miss Britton.

A. This would have been where my desk was here, and the rail, I would say, was about here. (Indicating the end of the jury box.) And Miss Keller's desk would have been back here, and I would have been between my desk and Mr. Price. But that seems like a pretty long distance. I don't know. I can't do any more.

Q. You are giving us your best recollection, aren't you, Miss Britton?

A. Yes, I am trying to.

Q. We don't want anything more than that, as you know. All right. Thanks a lot.

Mr. Casey:

May I ask some further questions?

Mr. Kirkpatrick:

Surely.

[79] *By Mr. Casey:*

Q. Miss Britton, how old are you?

A. Let's see. I think I am thirty-six or thirty-seven.

Q. And you have been with the bank since 1940, I thought you said.

A. Yes, I have, Mr. Casey.

Q. That is all. Thank you.

The Court:

That is all.

Mr. Kirkpatrick:

If your Honor please, these two witnesses, the witness Fruecholz and the witness Britton, are from California. I would like to inquire of counsel if they have any further questions before I release them to return to California. They are willing to stay as long as any purpose to be served.

The Court:

You are sure you have finished with them, are you?

Mr. Kirkpatrick:

I am sure I have finished with them.

The Court:

We will ask counsel for the defense whether they want these witnesses to stay in court.

Mr. Duggan:

They are excused as far as we are concerned.

Mr. Harrison:

The files and correspondence will be produced by counsel?

Mr. Kirkpatrick:

So far as you have requested any, or [80] any that I have, Mr. Harrison, they will be produced.

Mr. Harrison:

Specifically, we will get it right now. The letter—I think it was June 16, 1944, to Mr. Wesley.

Mr. Kirkpatrick:

I have that letter, your Honor, and will be glad to produce it.

Mr. Harrison:

That is all right.

Mr. Duggan:

Is that all you want, Mr. Harrison?

Mr. Harrison:

That is all.

The Court:

All right. Let's proceed with the trial.

(Photostat marked as Plaintiff's Exhibit No. 7, replacing exhibit marked as No. 7 yesterday.)

Mr. Kirkpatrick:

May it please the Court, this document, which has been identified as Plaintiff's Exhibit 7, and the next succeeding documents, consist of notices, sent by various persons, regarding the loss of these bonds. They are photostats, all of which have been furnished to me by Mr. Harrison from the files of the Federal Reserve Bank of Cleveland, or its Pittsburgh branch. Copies have been exhibited to the other defendants from time to time.

With that background, I offer in evidence, as Plaintiff's Exhibit 7, a photostatic copy of a letter from the Federal Reserve Bank of San Francisco, dated May 5, 1944, addressed by air mail to the Pittsburgh branch, Federal Reserve Bank of Cleveland, Pittsburgh, Pennsylvania. This letter
[81] bears a time stamp, showing receipt by the Federal Reserve Bank, Pittsburgh branch, on May 8 at eight fifty-three a. m. Attached to the letter is a photostatic copy, giving the list of the bonds involved in this proceeding.

Mr. Duggan:

What is the purpose of that purported offer?

Mr. Kirkpatrick:

The purpose of the offer is to show that notice was sent almost immediately upon the loss of the bonds, to the Pittsburgh branch of the Federal Reserve Bank of Cleveland, and actually received by it on May 8, 1944. It is also offered as one of a series of documents, intended to show the wide notice given to the loss of these bonds. And for that purpose, it is offered against all the defendants.

Mr. Duggan:

Since there is no offer made to show that the First National Bank in Indiana or the defendant, Gilbert S. Parnell received such notice, it is objected to as incompetent, irrelevant and immaterial. The notice to the Federal Reserve Bank, as suggested by Mr. Kirkpatrick, certainly could have no binding force or effect on either the defendant Parnell or the First National Bank in Indiana.

Mr. Miller, Jr.:

May the Court please, speaking for the First National Bank in Indiana, we have no objection to the fact that it is a photostat or to the admission, if it is as in the original part of his offer, as stated, for the purpose [82] of showing some matters between the Federal Reserve Bank and the Bank of America. To the extent that he states he is showing it as a chain of wide circulation, which would imply notice to the First National Bank in Indiana, only to that extent, would we object to it. Other than that, we are perfectly willing to have it admitted.

Mr. Harrison:

It is correct that I furnished these to counsel for the plaintiff, and that they are true copies of papers in the Pittsburgh branch of the Federal Reserve Bank of Cleveland, but I wish it understood that the stamps, and things like that, were put on after it was received, and also the handwriting on the attachment. Subject to that, the authenticity is conceded.

But on behalf of the Federal Reserve Bank of Cleveland, we object to the materiality, for reasons that will be argued as a matter of law.

Mr. Duggan:

Mr. Kirkpatrick, may I ask you a question? Do you have the least intention of showing that this notice was binding on the First National Bank in Indiana, or Mr. Parnell?

Mr. Kirkpatrick:

I don't know whether it was binding, Mr. Duggan. I think that is a question for the Court. I am of-

fering it for the purpose of showing that notice was widely given.

The Court:

I haven't seen it.

[83] *Mr. Duggan:*

Notice to whom?

Mr. Casey:

Mr. Duggan, I would like to get my objection on the record.

The Court:

One at a time. When you have finished. Let the other man have his chance. Just a minute, Mr. Casey.

Proceed.

Mr. Casey:

If the Court please, the defendant Rocco objects to the exhibit as having no probative value as far as defendant Rocco is concerned, the exhibit being incompetent as far as he is concerned.

Defendant Rocco further objects to the penciled notation on the second page of the exhibit, as expressing a conclusion.

Mr. Duggan:

That is right.

Mr. Casey:

Which should be deleted from the exhibit. I have no—

Mr. Kirkpatrick:

I have no objection, your Honor, in view of Mr. Casey's objection, to physically removing, by cutting

out or any other process agreeable with the Court, the word to which he objects.

The Court:

I think that should be done any way.

Mr. Duggan:

Mr. Kirkpatrick, will you admit, for the purpose of the record, that the notice or the letter contained in the exhibit that you propose to offer, was not sent either to the First National Bank in Indiana or Mr. Gilbert S. [84] Parnell?

Mr. Kirkpatrick:

No, I would not admit it, Mr. Duggan.

Mr. Duggan:

We certainly are going to object to it.

The Court:

The objections are overruled, except to the extent that the pencil notations will be removed before going to the jury. Cut that out.

Mr. Duggan:

Your Honor—

The Court:

I have ruled. We can't argue this matter. I think they are admissible, under the theory of the plaintiff's case. I assume it will be followed by further evidence, along the lines indicated in the pretrial.

Mr. Duggan:

Pardon me, sir. Does your Honor rule that a notice sent out, as indicated in the exhibit, whether it was ever received by the First National Bank in Indiana, or Mr. Parnell—

The Court:

I am just overruling your objection.

Mr. Duggan:

Thank you.

Mr. Kirkpatrick:

If I may have the exhibit from the Court, I will physically delete the pencil note.

The Court:

Delete that pencil note.

Mr. Kirkpatrick:

I think I have already, your Honor, offered this in evidence. It has now been received. I would like permission to read it and Exhibit it to the jury.

This is a letter on the letterhead of the Federal Reserve Bank of San Francisco, dated May 5, 1944. It is [85] addressed to the Pittsburgh branch, Federal Reserve Bank of Cleveland, Pittsburgh, Pennsylvania.

"Dear Sirs:

"A Los Angeles member bank has reported the loss on May 2, 1944, of Home Owners' Loan Corporation 3% Bonds called May 1, 1944, covered by the enclosed list."

The reference being to this list attached to the letter.

"We should appreciate if you will furnish information direct to the Federal Bureau of Investigation, 510 South Spring Street, Los Angeles, California, or to your local office of the Federal Bureau of Investigation if that office is acquainted with the case.

should bonds shown on this list be presented to you."

(Photostat marked as Plaintiff's Exhibit No. 8.)

Mr. Kirkpatrick:

Plaintiff offers in evidence a photostatic copy of a letter, on the letterhead of the Bank of America National Trust and Savings Association, Los Angeles Headquarters, dated May 9, 1944, addressed to the Federal Reserve Bank of Cleveland, Pittsburgh branch, Pittsburgh, Pennsylvania; the letter being from Ira E. Ogden, assistant vice-president. The letter bears on the reverse side, the time stamp of receipt by the Federal Reserve Bank, Pittsburgh branch, May 12, 1944, at three fifty-nine a. m.

Mr. Duggan:

I haven't seen that letter.

The Court:

What is the purpose of that?

[86] *Mr. Kirkpatrick:*

The purpose again, your Honor, is to show the wide-spread notice which was given to this, and actual notice to the Pittsburgh branch of the Federal Reserve Bank of Cleveland.

Mr. Duggan:

On behalf of the defendant, Gilbert S. Parnell, the offer is objected to as incompetent, irrelevant, and immaterial, having no probative value, and there is no offer on the part of the plaintiff to show that the contents of this letter or a copy thereof, was ever served on Gilbert S. Parnell or the First National Bank in Indiana.

Mr. Miller, Jr.:

On behalf of the First National Bank in Indiana, we object to the offer, only to the extent that it shows notice to the First National Bank in Indiana.

Mr. Harrison:

We object to the materiality of the exhibit.

The Court:

What is your specific ground, Mr. Harrison?

Mr. Harrison:

No duty, whatsoever, from the Federal Reserve Bank, Pittsburgh branch, Federal Reserve Bank of Cleveland, to the Bank of America, to pay any attention to any such notice.

The Court:

I understand that is your position. At this time, however, I am going to admit that notice.

I will admit it. The objections are overruled. We will receive it in evidence.

Mr. Kirkpatrick:

Your Honor, I would like permission [87] to read this letter to the jury.

This is a letter on the stationery of the Bank of America, Los Angeles Headquarters, dated May 9, 1944, addressed to the Federal Reserve Bank of Cleveland, Pittsburgh branch, Pittsburgh, Pennsylvania.

"Subject: Notice of Lost
or Stolen Bonds.

"Gentlemen:

"Under circumstances which indicate probable theft by person or persons to us unknown, we lost from

the Securities Department, at our Main Office in Los Angeles, California, on Tuesday, May 2, 1944, at about 12:15 P. M., $100,225 in par value amount of Home Owners' Loan Corporation 3% bonds due May 1, 1952—called for payment on May 1, 1944. The denomination and identifying numbers of the bonds are listed on the descriptive schedule thereof attached hereto. The bonds were in process of listing by regular employes of our Securities Department to be forwarded for redemption when, at a moment when the attention of the operative was diverted, they mysteriously disappeared. Our suspicion is that they were stolen by person or persons unknown to us who were seen loitering in the immediate vicinity of the department immediately before the disappearance.

"The Federal Bureau of Investigation was promptly called into the case. We are informed that the Bureau has given nation-wide notice of the loss or theft of these bonds; also, that you have received such notice.

"This is to further direct your attention to the theft or loss of these bonds and [88] their identity. If stolen, an attempt will undoubtedly be made to present them for redemption through one of the Federal Reserve Banks as the usual agency.

"If any of these bonds are presented to you for redemption or collection, we request that the bonds presented be retained by you, and that you give immediate notice thereof to the nearest office of the Federal Bureau of Investigation with telegraphic advice to us.

"We also request that any person or persons presenting any of these bonds be required to prove identity and ownership and that no claim of ownership be accepted as conclusive without notice to us of the nature of such claim and an opportunity to test its truth.

"We undertake in this reference to hold you harmless of any claim whatsoever which may result from such action for our protection."

Mr. Duggan:

Your Honor, the exhibit having been read and it containing self-serving inferences, and innuendos, and no attempt being made to show that this letter or any copy of it was in the hands of the defendant, Gilbert S. Parnell, or the First National Bank in Indiana, on the date that the bonds were negotiated, we renew now our objection and ask that the Court refuse to receive the exhibit in evidence, and instruct the jury to totally ignore anything that has been read before the jury in connection with the exhibit.

In other words, we have to have actual notice.
[89] He doesn't purport to show that, in this.

The Court:

As I take it, it is admissible. I am receiving it, in corroboration of the plaintiff's contention, and in line with its evidence, that the bonds disappeared. It is part of the business records of the bank, the Federal Reserve system, notice going out as to bonds having disappeared from the Los Angeles branch of this bank. Now, it is part of the business records. If there is hearsay or any other matter in there, that affects the weight of the transaction, but the evi-

dence negatives the proposition that the bonds left the bank in the ordinary course of business.

Mr. Duggan:

That is all it does.

The Court:

I am not ruling as to what that evidence is, and how far it goes. That question isn't before me, I don't believe. I am simply admitting that now for the purpose of this case on the offer. There may come a time when you are bound by it or when you are not. That may be up to you.

Mr. Duggan:

You mean later on you may move to strike it?

The Court:

I am admitting it now and overruling your objection. That is as far as I am going at this time.

Mr. Duggan:

Very well, sir. Of course your Honor understands there is another exhibit in evidence showing that these bonds were quite a distance—

[90] *The Court:*

I have some understanding, Mr. Duggan, of what is in evidence, and what has been offered in evidence. Some slight understanding.

Mr. Duggan:

Yes, sir.

Mr. Casey:

If the Court please, I would like to interpose an objection to the exhibit insofar as the defendant Rocco is concerned. I am satisfied that Mr. Kirk-

patrick doesn't intend by his exhibits to show notice to Mr. Rocco.

Mr. Kirkpatrick:

I am not contending, your Honor, that these documents actually came to the attention of these defendants. I am giving them as proof that there was wide notice given.

The Court:

For that purpose they are admitted. For that purpose, that they gave wide-spread notice of the transaction.

Mr. Duggan:

Your Honor, I don't want to appear captious. "Wide-spread" doesn't mean anything. We have got to have—

The Court:

Perhaps that he gave notice in accordance with the exhibits as offered.

If there is objection to the use of that word, I direct that that be deleted. He gave such notice as indicated by the exhibits.

(Document marked as Plaintiff's Exhibit No. 9.)

[91] *Mr. Kirkpatrick:*

Plaintiff offers in evidence as Plaintiff's Exhibit 9, a letter bearing three attachments. The first letter being a letter from the Treasury Department, Washington 25, being dated May 15, 1944, the letter being From D. W. Bell, Under Secretary of the Treasury, and addressed to, "My dear Mr. Fleming," Mr. Fleming, being identified as the president of the Federal Reserve Bank of Cleveland, this par-

ticular letter being to Mr. Fleming, the Federal Reserve Bank of Cleveland, as distinguished from its Pittsburgh branch.

I understand that Mr. Harrison is willing to stipulate that the communications represented by this exhibit were actually letters forwarded to the Pittsburgh branch of the Federal Reserve Bank of Cleveland. Is that correct, Mr. Harrison?

Mr. Harrison:

I will agree to that.

The Court:

I take it these are business records, taken from the records of these banks.

Mr. Kirkpatrick:

As indicated earlier, these were furnished to me by Mr. Harrison, and he tells me they were taken from the files of the Federal Reserve Bank.

Mr. Casey:

May we see the exhibit?

Mr. Duggan:

With the understanding that they have no probative value at all insofar as Gilbert S. Parnell [91-A] or the First National Bank in Indiana is concerned. We aren't interested. We don't care.

Mr. Miller, Jr.:

If the Court please, I hesitate to be bobbing in here, but to the extent that the—

The Court:

I think you want to make your objection each time.

It isn't a matter that a blanket objection can be made to. I want to hear your objection and rule on it.

[92] *Mr. Kirkpatrick:*

I have handed the Court the original of the document. I do not have another photostat.

The Court:

All right. Proceed.

Mr. Casey:

If the Court please, so far as the defendant Rocco is concerned, other than the top letter, I object to any conclusions expressed therein, as having no probative force or value or showing any notice as far as the defendant Rocco is concerned.

The Court:

It is admitted under the Business Records Rule. The question of what it says and so forth is for the jury. There may be matters of hearsay and all that sort of thing.

As I understand, you are still offering on the question of notice.

Mr. Kirkpatrick:

We are still offering on the question of notice and we take it it is our duty to offer the notice in the form it was actually given.

Mr. Casey:

If the Court please, I have no objection, that they were notified, as some of the exhibits say, "lost or stolen." The self-serving declarations in there, whether they be business records or not, should be

expunged from the record or some explanation given. As far as the date of the notice, that notice as to the particular number of bonds, the serial numbers of them, I have no objection. The first letter there—

[93] *The Court:*

The other matters are merely hearsay, aren't they?

Mr. Casey:

That is right.

The Court:

Under the Business Records Rule, the fact that they may be in there goes to the jury. The weight of it may mean something and may mean nothing. It is admissible. That that is contained in it doesn't make it inadmissible, *ipso facto*, as I understand the rule.

Mr. Casey:

As I understand the rule, as far as any self-serving—

The Court:

It is admissible for any purpose. The mere fact that it has something of that kind in it, it is still admissible.

Mr. Casey:

Not necessarily so. A business record kept in the regular course of business, with extraneous matter in it, harmful to this defendant, I think is the same as the handwritten—

The Court:

I think the sum total of all evidence is intended to be harmful.

Mr. Casey:

On the part of the defendant Rocco, I place my objection.

The Court:

Your objection is noted.

Mr. Harrison:

If the Court please, on this one I am not objecting.

The Court:

You are not objecting.

[94] *Mr. Miller, Jr.:*

If the Court please, on behalf of First National Bank in Indiana, we make the same objection.

The Court:

I understand. Objections overruled.

Mr. Kirkpatrick:

As I understand, your Honor, Plaintiff's Exhibit 9 is received in evidence and I would like permission to read the letter to the jury.

(To the jury) This is a letter on the stationery of the Treasury Department, Washington 25, addressed to Mr. Fleming, who was president of the Federal Reserve Bank of Cleveland, dated May 15, 1944.

"I am forwarding with this photostats of letters with enclosures dated May 3 and May 4, 1944, addressed to the Home Owners' Loan Corporation by the Bank of America National Trust and Savings

Association. You will note that the enclosure contains 'a schedule descriptive of $100,225.00 in Home Owners' Loan Corporation 3% Bonds due May 1, 1944-52' which it is stated were stolen from the Los Angeles Main office of the bank on May 2, 1944.

The Treasury believes that transactions in these bonds are governed by Circular 300 and accordingly assumes no responsibility whatever with respect to the bonds reported stolen. However, the Department wishes to be of all possible aid in tracing the securities and making such information as it may be able to gather available for that purpose. Accordingly, if any of the bonds are presented to your bank on any transaction, will [95] you please immediately, by telephone or telegraph, advise Mr. Guy Hottel, Special Agent in Charge, Federal Bureau of Investigation, 1435 K Street, N. W., Washington, D. C., furnishing in each instance the name and address of the bank, firm or person presenting the securities and at the same time will you please give the same advice to the Secret Service and to the Division of Loans and Currency.

If any of the bonds are presented in circumstances which lead you to believe that the presentation is being made other than in due course, you may withhold payment. In any such case, please notify the Commissioner of Public Debt immediately and await further instructions.

Additional copies of this letter, and of the attachments, are enclosed, with request you advise your Branches."

Then attached to that letter is a letter from the Bank of America, addressed to the Home Owners'

Loan Corporation, the letter being dated May 4. It reads as follows:

"I am enclosing list of serial numbers and denominations of Home Owners' Loan Corporation 3% Bonds, called for payment May 1, 1944, which were stolen from the Securities Department, Bank of America National Trust and Savings Association, at the Los Angeles Main Office, Seventh and Spring Streets, Los Angeles, on Tuesday, May 2, 1944.

The FBI has been notified and we understand that the New York, San Francisco and Los Angeles Stock Exchanges will advise their members [96] of the loss; and that the California Bankers Association is issuing a circular to all member banks in this connection.

The FBI, I am informed, will notify the Treasury Department and all of the Federal Reserve Banks and other banks throughout the States and has indicated that they also will advise the stock and bond houses throughout the country.

Should any of the bonds appearing on the enclosed list be presented for payment, please withhold payment and advise us of the circumstances."

Then a letter, written the day before, also by the Bank of America, dated May 3, addressed to the Home Owners' Loan Corporation:

"Attached is a schedule descriptive of $100,225.00 in Home Owners' Loan Corporation 3% bonds due May 1, 1944-52, that were stolen from our Los Angeles Main Office on May 2, 1944.

If possible, will you please place a stop against these bonds, and should any of them be presented,

immediately notify the Federal Bureau of Investigation.

An acknowledgment of this letter will be appreciated."

Mr. Duggan:

Now, your Honor, may I again suggest that since Mr. Kirkpatrick has read the contents of the exhibit —what is this exhibit?

Mr. Kirkpatrick:

Exhibit 9.

Mr. Duggan:

Exhibit 9, in which he refers to [97] Treasury Circular 300, that he read into the record the contents of that circular.

Mr. Kirkpatrick:

I don't think I have the obligation to do that, your Honor. I have no objection, on the other hand, to Circular 300 being introduced in evidence at this time, as one of the defendants' exhibits, if Mr. Harrison wishes to offer it.

Mr. Duggan:

You read it in connection with the exhibit that you offered. Now, I'd like you to read the circular.

Mr. Kirkpatrick:

It merely says the Treasury believes the transaction in these bonds is governed by Circular 300.

Mr. Duggan:

All right. Will you read the Circular 300?

The Court:

Now Mr. Duggan, I think the Court will have to insist that the Court run the trial, if you don't mind.

Mr. Duggan:

Very well, sir.

The Court:

You have made that request upon him. I don't see that he is called upon at this time to read it. He tries his case in his own way, step by step, as he understands what he wants to prove.

Mr. Duggan:

Well, if—

The Court:

However, when it comes to your case, [98] you may offer Treasury Circular 300—

Mr. Duggan:

If your Honor please—

The Court:

That document, No. 300, if you think it is relevant.

Mr. Duggan:

If your Honor please, I am only picking up these exhibits. I don't know anything about them. As Mr. Kirkpatrick—

The Court:

Then why do you want it read?

Mr. Duggan:

I want Treasury Circular 300 read as a part of this exhibit because it is referred to in this exhibit that your Honor has admitted.

The Court:

Does Mr. Harrison have Circular 300 here?

Mr. Kirkpatrick:

I think he has, sir. It is a large document.

The Court:

To satisfy Mr. Duggan, we will put it in.

Mr. Duggan:

The part of the circular that is germane to this offer.

Mr. Kirkpatrick:

Your Honor, I have no objection to this going in, but it is a rather complicated matter and I don't believe it is part of my case. As a matter of fact, I think it has been amended in some respects, and when we come to it there will be some amendments required. It isn't so simple, and I don't like to interrupt my case. It is available.

The Court:

It is in court and available. We will [99] leave it at that point.

Members of the jury, I want you to understand that in these exhibits the last two or three, there have been statements by various people, either members of the Treasury Department or officers of these banks, as to what happened to these securities. Now, I don't permit that in evidence as establishing any theft. I permit it on the theory of plaintiff that these bonds left its bank with a defective title. Under the Business Records Rule, if certain statements are made by various individuals, that goes to the jury, but it goes on plaintiff's contention that the bonds didn't leave its bank in the ordinary course of business. That is all there is to that. If

the statements are in there, as to the word "stolen," for instance, that doesn't establish whether the securities were stolen or not.

I don't know that that is important to you to establish that fact, at this time, by that correspondence.

All those are admitted for is for the purpose that I say: the bonds left the bank with a defective title.

Mr. Kirkpatrick:

And that notice was given.

The Court:

And notice.

Mr. Duggan:

To whom?

The Court:

Sit down, Mr. Duggan, if you will. We have been over that once.

(Document marked as Plaintiff's Exhibit No. 10.)

[100] *Mr. Kirkpatrick:*

If the Court please, plaintiff offers in evidence as Plaintiff's Exhibit 10 a photostatic copy of a document, also supplied by Mr. Harrison, as coming from the files of the Federal Reserve Bank of Cleveland, this particular one being from the Pittsburgh branch of the Federal Reserve Bank of Cleveland.

Mr. Harrison:

On that one, I make the same objection that I did to 7 and 8, as immaterial.

Mr. Miller, Jr.:

May I see that?

Mr. Kirkpatrick:

I do not understand that you object to the competency of it at all, Mr. Harrison.

Mr. Harrison:

It is an authentic copy.

The Court:

I think the authenticity of these documents was admitted at pretrial, that they were from the proper channels and so forth.

Mr. Kirkpatrick:

That is my understanding.

Mr. Miller, Jr.:

May I see a copy?

Mr. Kirkpatrick:

I think you have it.

Mr. Miller, Jr.:

They are not identified as exhibits in the ones I have.

We object particularly to this one, for the purposes which counsel has stated in his offer.

Mr. Kirkpatrick:

This one is offered, your Honor, as proof of widespread notice, as was the case in the others, and because of its contents it is also offered as proof of [101] notice having been sent to the Bank of Indiana.

Mr. Duggan:

If your Honor please, on behalf of the defendant, Gilbert S. Parnell—

The Court:

Just a moment. How is that notice to the Bank of Indiana?

Mr. Kirkpatrick:

By the way it is addressed, your Honor.

The Court:

That doesn't necessarily prove it.

Mr. Miller, Jr.:

This is going in this way, your Honor. I think it it is wrong.

The Court:

I think you are going a little step beyond what I admitted the other documents for.

Mr. Kirkpatrick:

That is correct. It may be your Honor may not receive this one for that proposition. Whatever the effect of the words, to whom it is addressed may be, I think is a matter of argument. It isn't conclusive proof, certainly, that it was received by the Bank of Indiana.

The Court:

What do you propose to offer in the way of proof that it was mailed to that particular bank?

Mr. Kirkpatrick:

Your Honor, I will be glad to call and try to make available the records of the office of the Federal Bureau of Investigation here in Pittsburgh, to the effect, and to produce a witness who will testify that the words, "To all banks," would include, it is my [102] understanding—

Mr. Miller, Jr.:

No.

Mr. Kirkpatrick:

Just a minute.

The First National Bank of Indiana. I must state in frankness to the Court, however, that it is my understanding that if I do call the Federal Bureau of Investigation, they will refuse to testify as a matter of policy, being against the policy of the bureau to give any testimony in private litigations.

Now, if there is any question about that, I will be glad to call a witness, to further tie in this exhibit to the Bank of Indiana.

Mr. Miller, Jr.:

May the Court please, I have a hesitancy about counsel at side bar, but I do think in this instance, we ought to have an offer at side bar here, and a discussion in this matter. I think inferences have been drawn so far here that are entirely false. And as a result, I object to the offer in general.

The Court:

I will direct that the jury may leave the courtroom, direct the jury to go to their quarters for the time being. We will discuss this matter not in the presence of the jury.

The jury will be excused temporarily.

(The jury left the courtroom.)

[103] *Mr. Casey:*

If the Court please, defendant Rocco objects to the admission of Exhibit 10 as having no probative value whatsoever, being not a business record, and

being purely an expression of opinion of the Federal Bureau of Investigation.

The Court:

I think, Mr. Kirkpatrick, this is outside the scope of those other admissions, the rule, the records of the Federal Reserve Bank, San Francisco, Cleveland, and the Treasury Department of Washington. Here is a notice that comes for a different purpose. This notice was sent out for the purpose of apprehending somebody, and it characterizes, to a greater extent, not just inherently in the document, but designates somebody as a sneak thief, may possibly try to do certain things, and directs people to be aware.

Mr. Kirkpatrick:

My point in offering it first, your Honor, if I may start with the simplest ground, I think: Here is a document actually received by one of the defendants in this case, supplied to me by counsel for that defendant, as being contained in their files.

The Court:

You refer to the Cleveland bank?

Mr. Kirkpatrick:

I am referring to the Cleveland bank, and specifically to the Pittsburgh branch. I understand Mr. Harrison is willing to stipulate that the document was also received by the Federal Reserve Bank
[104] in Cleveland.

Is that correct, Mr. Harrison?

Mr. Harrison:

I don't believe so. The only one I know, is the one stamped on the back, the Pittsburgh branch.

Mr. Kirkpatrick:

Apparently I am in error. At lease the particular branch through which these bonds passed. I take it, your Honor, that if the Federal Reserve Bank actually paid and had this document before them, they would be guilty of bad faith, and they would be liable to my client.

The question which will arise, so far as Mr. Harrison's client is concerned, is whether or not this notice was lost or overlooked, or for some reason didn't come to their attention when these bonds were actually paid.

He has an argument there. I am frank to admit that, that it may exculpate them.

The Court:

As I understand, he is not objecting to this document. Mr. Harrison is not.

Mr. Harrison:

I am objecting on the ground that it is immaterial. Far more than Mr. Kirkpatrick—

The Court:

Same ground. You take the position that that doesn't fix liability on you in any event.

Mr. Harrison:

My objection is not limited to the statement Mr. Kirkpatrick just made, that we may [105] show that we didn't have it in mind at the time.

The Court:

I understand. That is so far as the Cleveland bank.

Mr. Kirkpatrick:

How about the Cleveland bank?

The Court:

How does it affect the Bank of Indiana, having due regard now as to the state of the record?

Mr. Kirkpatrick:

That, I take it your Honor means that the document is properly admitted in evidence for some purpose—assuming I am correct—against one defendant, namely the Federal Reserve Bank of Cleveland.

The Court:

I can't prevent you—merely because one defendant doesn't object doesn't make it admissible against the other three.

Mr. Kirkpatrick:

But it is admissible, is it not, your Honor, against the Federal Reserve Bank of Cleveland, as actual notice?

The Court:

It might be.

Mr. Harrison:

On that point, we think it is not admissible, even against the Federal Reserve Bank of Cleveland, Pittsburgh branch, because of the immateriality. If it were harmless, if it were otherwise harmless, we might subside. But when on top of the immateriality it carries harm, we think that the Court should exclude it.

Mr. Kirkpatrick:

Your Honor, I think the matter [106] is clearly ruled by a United States Supreme Court decision.

I refer to the case of *Ritchie versus Graham, versus White-Phillips and Company,* in 296 United States 27; 80 Law Edition, 20, 1935.

The issue in that case—and this case is very helpful, I think, on several points before us—the issue in that case was whether or not, when evidence was offered that the defendant at one time actually had notice that the bonds were stolen, that that fact in and of itself justified a directed verdict against that defendant. It was conclusive evidence of *mala fides.*

The case went to the Supreme Court on the basis that that was the law in Illinois, and that it had been so determined by the court of last resort of Illinois.

Now, the Court held that the court of last resort of Illinois had not so construed the Negotiable Instruments Law in Illinois, and that therefore the Federal Court was not bound by a decision of a court of last resort. I say the case is very interesting on this question of state law, anyway, because that is how far it goes. And that wasn't disputed. The only question there was there a decision in the court of last resort of Illinois which was conclusive on the federal courts. The Supreme Court first held, since there was no definitive decision of the court, as they found it, it [107] wouldn't be conclusive.

Then they went on to review the law generally on the effect of having at one time received actual notice—

The Court:

Mr. Kirkpatrick, I don't understand that there is objection here—perhaps there might be, but for

the purpose of our discussion, I don't understand that there is any objection that an actual notice was received by the Bank of Indiana, for instance, that the bonds were stolen. The point here, as I understand it, is that this isn't the type of notice—in other words, proven as such—the mere introduction of this document sent out by the F.B.I. doesn't bring home notice.

Mr. Kirkpatrick:

Not to the Bank of Indiana. I am speaking of the Federal Reserve Bank of Cleveland. Here is a document found in the file, and as Mr. Harrison admits, found in the file of the Federal Reserve Bank.

The Court:

We left that for the time being, and have gone to the other defendants.

Mr. Kirkpatrick:

I am sorry, your Honor.

The Court:

I want to see whether it is admissible against these other defendants.

Mr. Kirkpatrick:

I am sorry, your Honor. May I have just one second on this case? The Supreme Court [108] held:

"But if bona fides of the defendant must be judged, of from their acts, purposes and knowledge as they existed upon the day of the purchase, then the notice served is only *prima facie* or presumptive of *mala fides*, and may be rebutted by proof that the notice was lost."

I take it that case holds that even as the Federal Reserve Bank, they will probably have to offer some proof as to why they didn't act pursuant to that notice.

I hand up to the Court, if I may, a reference to that decision.

Mr. Harrison:

Is that a Government bond case, effected by Government relations?

Mr. Kirkpatrick:

I don't recall, Mr. Harrison. As far as I know, it is not.

Mr. Harrison:

I believe not.

Mr. Miller, Jr.:

May the Court please—

Mr. Kirkpatrick:

May I finish—

The Court:

I want to hear Mr. Kirkpatrick on why this is admissible against the other defendants.

Mr. Kirkpatrick:

Let's come to the question of the Bank of Indiana. Of course, the document shows on its face that it is addressed to all banks and securities brokers. I take it that that means that the document [109] itself is some evidence that it was sent to the parties to whom it purports to have been sent. Now, the only question is, is what notice was given generally, and I take it that I could offer, for example, in this case, news-

papers published in the Bank of Indiana, if they identified these bonds, for the purpose of showing that there was wide-spread notice in the community that these bonds had been lost, or had been claimed to have been lost. It doesn't make any difference whether they were lost or stolen or what. If there was wide-spread notice in that community, which may have come to the attention of these banks, or to Mr. Parnell, then he can be affected by that notice, because the question that the jury is going to have to consider in this case, assuming there is not a directed verdict against these defendants in view of the call feature, is, did the Bank of Indiana, and did Mr. Parnell take these bonds in good faith, and did they have any reason to not inquire, or did they wilfully shut their eyes to it, for their own purposes?

And on that purpose, it isn't important that the statement be correct. It isn't offered for proof that the statements contained in it are correct. It is offered for the proof that notice was given to certain people. And even if it was given only to the Mellon bank and [110] a half dozen other banks, it would still be a wide-spread notice from which the jury might infer that it got to the Bank of Indiana.

That brings me to the second question, your Honor. As I say, I am perfectly willing to ask the Court to issue a subpoena directed to the Federal Bureau of Investigation, and I have every reason to believe that if they respond to it, they will testify it was in fact sent to the Bank of Indiana.

And that raises the question on my failure to call them. If there is going to be any question or comment by these defendants that they were not called,

then I want to call them for the purpose of establishing that they won't testify.

The case, your Honor, as I see it—

The Court:

The point I have some apprehension about is that a document taken from the files of the Federal Reserve Bank in Cleveland is admissible against the Bank of Indiana, on the question of notice, showing that it must have been received by them in the ordinary course of business. That is the trouble with it. I don't think there is any question but what you can show notice—

Mr. Kirkpatrick:

I have no objection to it if your Honor feels it would be proper to instruct the jury that it is not offered as proof that the Bank of Indiana [111] actually received it. I have no objection to that instruction. I take it if I came in here with handbills that had been scattered all over Indiana, I would be entitled to show that those handbills were common in Indiana, and it didn't make any difference whether or not this man got it or not, it still would go to the question of the jury testing his credibility. That is the Bank of Indiana and Mr. Parnell.

The Court:

What do you have to say, Mr. Miller?

Mr. Miller, Jr.:

May the Court please, this testimony is, as I gather it, a series of testimony. He started with certain matters of the Federal Reserve Bank, and on my objections—which I confess at that time were not too vigorous, the counsel represented that as

a series of testimony, it would constitute notice to the First National Bank of Indiana. Now his offer is of such a nature that it shows that it does not culminate with notice to the First National Bank in Indiana, of any sort, nature or kind whatsoever, other than a simple matter of a blanket letter to all banks or to any banks.

I therefore must feel that as this offer is made, for the purpose of showing that it is—and as this whole series of testimony was made, or of evidence was made for the purpose of showing notice, that as a result of that, not only is this offer objectionable, but that [112] the whole series of offers, as they have been made so far, insofar as the First National Bank in Indiana is concerned, are objectionable, on the grounds which Mr. Kirkpatrick has originally stated he offered them for.

Mr. Kirkpatrick:

The difficulty with that argument, as I understand it, your Honor, is that it presupposes that my case rests upon establishing actual notice on the Bank of Indiana, and I don't think there is any basis for that.

Mr. Miller, Jr.:

I asked to be heard. I would like—

Mr. Kirkpatrick:

Pardon me. I thought you were through, Mr. Miller.

Mr. Miller, Jr.:

It is quite clear that these notices, in a case like this, can not be as Mr. Kirkpatrick talks about it.

circulating handbills and so forth. I can't see where that has any relevancy, let alone any truth in it.

I think that a matter of notice to a bank, the order of proof is entirely to the contrary. There isn't even a semblance of order of proof here. This is produced by one of the defendants, out of their records. That defendant objects to the materiality themselves, and then it is put in, and asked to be put in evidence here without any authentication or direction, insofar as the connection [113] with the First National Bank in Indiana is concerned at all.

If, at a later date, when witnesses may be called to show anything about the circumstances of any notices like that, certainly the proof can go on in. But not with all that we have here. All we have is a photostatic copy of something, and we are asked to admit to it.

Mr. Kirkpatrick:

Your Honor, if I understand from the statement of Mr.—

The Court:

We will hear from Mr. Casey.

Mr. Kirkpatrick:

That Mr. Miller just made, if he is raising a question of authenticity with regard to his client—

The Court:

I do not understand that as such.

Gentlemen, what I have in mind is this: Here is a record taken from the Federal Reserve Bank of Cleveland. It is not a record made by them.

Mr. Kirkpatrick:

That is correct, sir.

The Court:

It is a record apparently made by the F. B. I., in due course of business. We switch from the banking records, which I have admitted in this case, to the record of the F. B. I.

We have no testimony by any F. B. I. agent that it was sent anywhere. All we have is the statement on the top of the letter addressed to all banks and [114] security brokers. And it is not even in the record as to how it was received by the Cleveland bank; how it got in there, or why it is there, and all that sort of thing. Yet you offer that as notice to this Bank of Indiana. I don't think it goes that far. That is the point of it.

I am not ruling that you can't give notice. Or if you have handbills that were circularized in the area, that went up to that area, that is a different proposition. There is no such showing here.

Mr. Kirkpatrick:

May I make this suggestion, your Honor? I will limit my offer at this time as to this document, as proof of actual notice in the files of the Pittsburgh branch of the Federal Reserve Bank. And I understand their sole objection, if I understand Mr. Harrison correctly, is as to relevancy and materiality. And there is no question.

The Court:

Will they stipulate with you that they got notice from the F. B. I. that these bonds were stolen on that date?

Mr. Kirkpatrick:

Mr. Harrison, will you stipulate that this letter was received by your client on May 22, 1944? It bears the time stamp on the bank.

Mr. Harrison:

Yes, we received it at that time. But our objection stands as it was, insofar as—might I add this? That insofar as it is offered to prove [115] notice to the Federal Reserve Bank, it is cumulative to about half a dozen other things already put in. And as we maintain, repeating myself, utterly immaterial, in view of the regulations.

The Court:

To satisfy Mr. Kirkpatrick, on his last proposition, as I understand it, perhaps whereby we can get along with the case, as I understand it, you are willing to stipulate you got notice from the F.B.I. on May 22, 1944, that these bonds were purported to have been stolen. That covers his purpose.

Mr. Harrison:

We will stipulate we received this on May 22.

Mr. Kirkpatrick:

Stipulate that he received this notice.

The Court:

I don't want this to go to the jury at this time. That is why I am suggesting stipulation rather than this particular item. Otherwise, I am not going to admit it under the present proof.

Mr. Kirkpatrick:

I would say further to these defendants, that if the document isn't received now, I propose to call

the Federal Bureau of Investigation, a person from the office in Pittsburgh, for the purpose of proving that this document was in fact mailed by the Federal Bureau of Investigation.

The Court:

All right.

Mr. Kirkpatrick:

They have objected and said to me at times that they would prefer not to have the Federal
[116] Bureau of Investigation on the stand for other reasons, and I am trying to be fair about it. But if they are going to insist on that, I am going to call the Federal Bureau of Investigation to prove it was sent.

Mr. Miller, Jr.:

Just a minute. There has never been—counsel for the other side has the opportunity for discovery, just as we used discovery in this case. They have the opportunity of request, certainly between counsel, and no mention of this matter has ever been made before to us under any circumstances.

Mr. Kirkpatrick:

That is not true, your Honor. In the deposition that was taken in New York, my recollection is that a similar document was down there as one of the exhibits, and you attended the depositions.

Mr. Miller, Jr.:

I attended the depositions, and objected to the whole depositions.

The Court:

This matter that you are arguing is not before this Court, I am sorry to say. I am not going to

rule on what you are going to do, and so forth. You will have to try the case in your own way. I am just going to rule on exhibits that are presented. That is all.

Mr. Casey:

I take it the state of the record now is, if your Honor please, as far as defendant Rocco is concerned, there is no offer. As far as he is concerned, is that right, Mr. Kirkpatrick? Under the present statement, you [117] don't offer it against him as being a banker or security house?

Mr. Kirkpatrick:

That is right. At the present state of the record.

The Court:

Or as to Parnell?

Mr. Kirkpatrick:

That would be correct.

Mr. Duggan:

May I suggest something to your Honor? In the presence of the jury, your Honor directed me to sit down, which, of course, was all right. I am attempting to try this case and protect the interests of my client. If I am in error in the manner in which I proceed, I am sorry. But I will always, of course, abide by the suggestions of the Court. I will say this: In my forty-four years of practice, that is the first time that that request has ever been made to me.

The Court:

Now, Mr. Duggan, I don't mean that personally.

I say this to you in all frankness: I don't permit counsel to jump up over trivial matters and repetitious matters. We had been over several matters there, and you were coming up and objecting about it. I suggested to you on that—that that was so trivial that the Court just ignored it.

Mr. Duggan:

That is all right, sir.

The Court:

We want to stick to the main issues.

Mr. Duggan:

I apologize. But in connection with the offer, Treasury Regulation or Circular 300 was read into
[118] an exhibit that your Honor—

The Court:

Now, Mr. Duggan, I think you know the rule. There was another document referred to.

Mr. Duggan:

That is right.

The Court:

If you want that, you may have it. But he is not bound to read it because it is referred to. He tries his own case. The Court has some discretion in the order of proof. All I indicated to you was that when the proper time came and you wanted to use that, you could. I am not going to insist at your request, merely—he didn't want to introduce it at that time. That was the ruling of the Court. Let's leave it there.

Mr. Duggan:

May I ask your Honor if at this time is Treasury Circular 300, which was mentioned in his exhibit that was admitted, a part of the record of this case? I hope it is.

The Court:

I don't understand that it is at this present time.

Mr. Duggan:

I see. Thank you.

The Court:

As far as I am concerned, it may be admitted at any time.

Mr. Miller, Jr.:

Just one matter, which I am not sure whether I asked for or not, was that I request therefore a motion to strike the prior exhibits just recently offered, to the extent that they show notice to the First National [119] Bank in Indiana. One of the purposes which they were offered for.

The Court:

They show notice. Mr. Miller, as I understand the Court's position—if counsel don't understand it, I will be glad to repeat it. I have admitted those prior exhibits, in accordance, as I understand, with plaintiff's theory, that the bonds disappeared from the bank, not in the ordinary course of business, but in effect that they were stolen, that they gave notice, that they acted as a person who had lost some property. And through banking channels, the proper notices were given.

Now, the question is, it isn't necessarily conclusive on your man, your bank, as to whether they got it or whether they didn't. But notices went out through banking channels. If he wants to bring that home to you, that is up to him.

Mr. Miller, Jr.:

Thank you, your Honor.

The Court:

It goes to a question of a defective title of these bonds at some point. I am excluding this particular offer.

Mr. Miller, Jr.:

I perhaps misunderstood Mr. Kirkpatrick's statement of his offer, then.

The Court:

All right. Is there anything else you want to take up before the jury returns? Do you have anything along this line that you might bring up now?

(Documents marked as Plaintiff's Exhibits 11 and 12.)

Mr. Kirkpatrick:

I do have two more of these [120] exhibits. Maybe they want to look at those now.

The Court:

Let's bring them up. If there is something along that nature, let's discuss them while the jury is out.

Mr. Kirkpatrick:

They are Exhibits 11 and 12. Maybe counsel would like to look at them now.

The Court:

What are those?

Mr. Kirkpatrick:

No. 11—and these again both came from Mr. Harrison's files—a letter of June 27, 1944, from the Treasury Department to the Federal Reserve Bank of Cleveland, and it is in reply to a letter dated May 15, 1944, from the Federal Reserve Bank of Cleveland to the Treasury Department, telling them how they expect to handle this thing. Again, it is offered as proof of the state of the record.

I think so far as giving notice is concerned, it is cumulative.

On the other hand, I think Mr. Harrison felt that in fairness, he deserved to have the position of the bank before the jury, and I have no objection to that.

Mr. Harrison:

If the Court please, on this one, we do not object. We wish it noted that the typewritten matter at the bottom, "cc: Messrs. Laning" and so forth, was put on at the office of the Federal Reserve Bank of Cleveland, in Cleveland, to indicate within their file, to whom copies [121] were sent. I will stipulate that one copy, as indicated there, came to the branch at Pittsburgh.

Mr. Duggan:

Of course, your Honor, on the part of the defendant, Gilbert Parnell, it is objected to. It is correspondence between third parties, and concerning which we have no notice, unless they propose to follow it by proof that we had notice prior to the date of the negotiation of these bonds. It certainly can't

be binding on the defendant, Parnell. None of this evidence that has been introduced can affect him unless he had actual notice of it.

We say that the federal law controls, because these are federal obligations, and under the federal law, there is bound to be actual notice, which up to this time has not been produced.

As to Parnell, communications between different departmental agencies can not by any stretch of the imagination be admissible as binding on him.

In fact, we knew nothing about it. I never heard of it until now, your Honor. That is the reason I am stepping into this situation.

The Court:

Is that No. 11?

Mr. Kirkpatrick:

That is No. 11, your Honor.

The Court:

What is No. 12?

Mr. Kirkpatrick:

No. 12 is a photostat of a letter [122] from the Federal Reserve Bank of San Francisco, to the Pittsburgh branch of the Federal, again giving notice.

I have no purpose of cumbering this record with unnecessary documents, but I think the extent of the notice is important, and for that reason, I prefer to offer them. Also, I think I have some obligation, so far as Mr. Harrison is concerned, to offer that one letter, but—

Mr. Harrison:

As to this last one, one of October 30, 1944, we object on the ground that it is not material.

Mr. Miller, Jr.:

As to—

The Court:

As I understand, the reason for that is, you don't claim to be liable under or by virtue of the Treasury regulations and the law of the United States, regardless of notice.

Mr. Harrison:

That is correct.

Mr. Miller, Jr.:

The First National Bank of Indiana also objects on the grounds heretofore stated.

Mr. Casey:

Is this offered against my client, Mr. Rocco, Mr. Kirkpatrick?

Mr. Kirkpatrick:

It is offered for the purpose of showing that the bank gave notice generally. To that extent, yes. It is not offered for the purpose of showing that he actually received it.

In fact, No. 11, it being interdepartment, I am [123] willing to offer it only as to the Federal Reserve Bank, if you really object to it.

Mr. Duggan:

Mr. Kirkpatrick, as to the defendant, Gilbert S. Parnell, is it your intention to show by the reason

of these various exhibits, the numbers of which I don't now have before me, to show that he had actual notice that these bonds had been stolen?

Mr. Kirkpatrick:

I do not so contend. I thought I made clear at pretrial, Mr. Duggan, what my theory of the case was.

Mr. Duggan:

O. K. That is all.

The Court:

Eleven is admitted against the Cleveland Bank only.

Mr. Kirkpatrick:

Yes, I am willing to offer it that way.

The Court:

We will admit it. I am going to overrule the objection then, and admit those two documents.

I have sustained the objection to this document—has that been identified as the Federal Bureau of Investigation—

Mr. Kirkpatrick:

That is 10, your Honor. Do I understand it that in sustaining it, it was subject to a stipulation which we can make with Mr. Harrison?

The Court:

I suggest in view, perhaps, to prevent any further discussion over it, if that is satisfactory, [124] but if it can't be agreed to, that is the end of it.

Mr. Kirkpatrick:

I understand Mr. Harrison was willing to stipulate

that this document was received by—I guess to express it, so that the document doesn't at this time go to the jury, to stipulate that—

The Court:

The stipulation suggested by the Court was, in lieu of this exhibit, that it was agreed that the F. B. I., the Federal Bureau of Investigation, gave notice to the Federal Reserve Bank of Cleveland, on or about May of 1944, that these particular numbered bonds had been stolen from the plaintiff's bank.

Mr. Harrison:

It could be stipulated that the Federal Bureau of Investigation, Pittsburgh office, under date of May 20, 1944, gave a notice which was received by the Pittsburgh branch of the Federal Reserve Bank of Cleveland, on May 22, 1944, at eight fifty-nine a. m., to the effect that $100,225 of Home Owners' Loan Corporation bonds had been reported as having been taken from the bank in Los Angeles, and going on to say that,

> "The securities, being negotiable, may be cashed at any bank or broker's office, and for the purpose of causing the apprehension of the person responsible for the theft, you are furnished hereinafter with the serial numbers"—

of the securities.

Mr. Duggan:

Of course, that admission doesn't affect either the First National Bank of Indiana or Mr. [125] Parnell.

The Court:

Are you willing to accept that?

Mr. Kirkpatrick:

I am willing to accept it with this qualification, your Honor: That I am not foreclosing myself from putting this document in later.

The Court:

Don't misunderstand the Court. I threw that out merely as a suggestion. If you men are going to argue about it—

Mr. Kirkpatrick:

I have no objection to the stipulation at all.

The Court:

I am not insisting you accept it.

Mr. Kirkpatrick:

I am perfectly willing to accept it, but I don't want any misunderstanding that I wouldn't again introduce the document after I called the F. B. I.

The Court:

In view of the present offer, you accept the statement of Mr. Harrison as a stipulation in the case?

Mr. Kirkpatrick:

That is correct.

The Court:

That may be admitted in evidence as against the Federal Reserve Bank of Cleveland. Just exactly in the words of Mr. Harrison. The reporter has them.

Mr. Kirkpatrick:

Would she read that to the jury, just in that form, when they return?

The Court:

She may read that to the jury. As evidence against the Federal Reserve Bank of Cleveland only.

[126] *Mr. Kirkpatrick:*

Then Exhibit—

Mr. Harrison:

Pardon me. I see I stopped in reading the quote a little too soon.

> "The securities being negotiable may be cashed at any bank or broker's office, and for the purpose of causing the apprehension of the person responsible for the theft, you are furnished hereinafter with the serial numbers"—

of the securities,

> —"with the suggestion that should any person call upon you for the purpose of cashing any of the given securities, you notify this office by telephone collect, the telephone number being GRant 2000."

The list of serial numbers is then given and the notice ended,

> "I wish to thank you in advance for your co-operation in this matter."

The Court:

That stipulation is in evidence.

Is there anything else that we should discuss at this time?

Mr. Kirkpatrick:

I will understand as to 11, I will offer that only as to the Federal Reserve Bank?

The Court:

That is admitted as to the Federal Reserve Bank. 12 is admitted generally.

Mr. Kirkpatrick:

12 is admitted generally?

The Court:

Yes.

Mr. Kirkpatrick:

May I ask the Court if we may have a recess for about five minutes, for the benefit of counsel [126-A] as well as for the jury?

The Court:

The Court has that in mind.

We will take a fifteen minute recess at this time.

(A recess was taken at this time.)

(Note: Change of reporters at this time.)

[127] *Mr. Kirkpatrick:*

May it please the Court, in lieu of offering in evidence at this time Plaintiff's Exhibit 10, I will ask the court reporter to read to the members of the jury the stipulation between counsel for the plaintiff and counsel for the Federal Reserve Bank of Cleveland.

(Said stipulation read to the jury as follows:)

"*Mr. Harrison:*

It could be stipulated that the Federal Bureau of Investigation, Pittsburgh office, under date

of May 20, 1944, gave a notice which was received by the Pittsburgh branch of the Federal Reserve Bank of Cleveland on May 22, 1944, at 8:59 a. m., to the effect that $100,225 of Home Owners Loan Corporation bonds had been reported as having been taken from the bank in Los Angeles and going on to say that 'the securities being negotiable may be cashed at any bank or broker's office, and for the purpose of causing the apprehension of the person responsible for the theft you are furnished hereinafter with the serial numbers' of the securities, 'with the suggestion that should any person call upon you for the purpose of cashing any of the given securities, you notify this office by telephone collect, the telephone number being GRant 2000.'

"The list of serial numbers is then given and the notice ended, 'I wish to thank you in advance for [128] your cooperation in this matter.' "

Mr. Duggan:

Now, it is understood, if your Honor please, that this stipulation has no binding effect on either the First National Bank in Indiana or Gilbert S. Parnell as to notice.

The Court:

Members of the jury, counsel have agreed—and, Mr. Duggan, I think when I say this I will cover your proposition—counsel for plaintiff and counsel for Federal Reserve Bank of Cleveland have agreed on what was just read to you. And, of course, that affects the Federal Reserve Bank of Cleveland only. It is not admitted in this case in any way whatsoever

as against the other three defendants, for any purpose.

All right. Proceed. I think that answers your proposition, Mr. Duggan.

Mr. Duggan:

Yes, your Honor.

Mr. Kirkpatrick:

If the Court please, plaintiff offers in evidence Plaintiff's Exhibit 11 as against the Federal Reserve Bank of Cleveland, the proof of actual notice with respect to these bonds.

The Court:

All right. I have ruled on that matter. You may read that to the jury. This is against the Federal Reserve Bank of Cleveland only.

Mr. Kirkpatrick:

I understand.

The first letter of this exhibit, members of the jury, [129] is a letter from W. L. Findeisen, Assistant Cashier of the Federal Reserve Bank of Cleveland. It is addressed to Mr. W. Wesley, Chief, Division of Loans and Currency, Treasury Department, Washington, D. C. It is dated May 15, 1944. It says:

"Dear Mr. Wesley:

"We have received a letter dated May 5,"—

Mr. Harrison:

Just a minute, Mr. Kirkpatrick. I don't think that letter was offered.

Mr. Kirkpatrick:

Yes: it is attached to the letter.

As I say, this is a letter from the Assistant Cashier of the Federal Reserve Bank of Cleveland to Mr. Wesley, Division of Loans and Currency of the Treasury Department:

> "We have received a letter dated May 5, from Mr. J. M. Osmer, assistant cashier of the Federal Reserve Bank of San Francisco, California, advising us that on May 2, $100,225 par value of Home Owner's Loan Corporation 3% bonds, called for redemption on May 1, 1944, mysteriously disappeared from the securities department of the Bank of America, National Trust and Savings Association, Los Angeles, California.
>
> "Similar information has been received direct from the owning bank, supported by a list showing the denominations and serial numbers of the bonds reported stolen. We have been requested by them to give immediate notice to the nearest office of the Federal Bureau of Investigation, with telegraphic advice to the owning bank; and to require that any person or persons presenting such bonds prove [130] identity and ownership, and that no claims of ownership be accepted as conclusive without notice to the owning bank of such claim and an opportunity for them to test its truth.
>
> "In view of the provisions outlined in paragraph 79 of Department Circular No. 300, and Federal Reserve Bank Memorandum No. 111, dated May 15, 1922, with respect to lost or stolen United States coupon bonds and notes, it is our intention, in the event any of the bonds are presented

for counter payment at this bank, to issue a receipt and simultaneously notify the local offices of the Federal Bureau of Investigation and your office. Inasmuch as the Treasury Department assumes no responsibility whatever with respect to coupon bonds reported stolen, and enters no stoppages against their payment, exchange, or conversion, we will, in our capacity as Fiscal Agent, issue a check within a day or two subsequent to the issuance of the receipt, unless you advise us to the contrary.

"It will be appreciated if you will promptly advise us if this procedure meets with your approval so that we will be in a position to properly function such securities in the event they are presented at the main office of this bank or our branches at Cincinnati or Pittsburgh."

And then a letter from D. W. Bell, Under Secretary of the Treasury, dated June 27, 1944, addressed to Mr. W. L. Findeisen, Assistant Cashier, the author of the previous letter, showing copies among others to Cincinnati Branch and Pittsburgh Branch. This letter reads as follows:

[131] "Dear Sir:

"Reference is made to your letter dated May 15, 1944, relative to information furnished you by Mr. J. M. Osmer, Assistant Cashier of the Federal Reserve Bank of San Francisco, of the disappearance from the Bank of America, National Trust and Savings Association, Los Angeles, California, of coupon Home Owners' Loan Corporation 3 percent bonds, Series A, 1944-52 (called), in the total amount of R100,225; and

to similar information received direct from the owning bank, supported by a list showing the denominations and serial numbers of the missing bonds.

"In view of the amount involved in this case and the desire to be of all possible aid in determining the source of receipt of any of the bonds presented, on May 15, 1944, I addressed a letter to the President of each Federal Reserve Bank requesting that if any of the bonds involved are presented to them they immediately notify, by telephone or telegraph, Mr. Guy Hottel, Special Agent in Charge, Federal Bureau of Investigation, 1435 K Street, N. W., Washington, D. C., the Secret Service, and the Division of Loans and Currency, furnishing in each instance the name and address of the person, firm or bank presenting the securities, and withhold payment if it is believed the bonds have been presented in other than due course. That letter has no doubt been received by Mr. Fleming at this time. However, you are correct in your understanding that if bonds are presented in the regular course of business, you should continue to disregard any requests coming from banks, individuals, insurance companies and others that you take any action which would interfere with the complete negotiability of bearer Government securities."

Mr. Harrison:

Mr. Kirkpatrick, you read the word "business" in at one point—inadvertently, I know—after [132] the word "course"—

Mr. Miller:

In the fourth line from the bottom.

Mr. Kirkpatrick:

Oh,—"However, you are correct in your understanding that if bonds are presented in the regular course, * * *"—the word "business" is not in. I am sorry, Mr. Harrison.

Plaintiff offers in evidence, as proof of notice given—

The Court:

Is that 12?

Mr. Kirkpatrick:

That is 12.

The Court:

That is in evidence.

Mr. Kirkpatrick:

It is cumulative, and I think need not be read to the jury at this time, your Honor.

That completes at this time, your Honor, until the introduction of more testimony, the evidence with respect to the question of notice. And I would like to proceed at this time to read to the jury certain admissions in the answers of certain of the defendants.

The Court:

All right.

Mr. Kirkpatrick:

Plaintiff offers in evidence paragraph 7(b), (c), (d) and (e) of the answer filed in this case by Gilbert S. Parnell.

The Court:

Well now, at this point, weren't there some admissions in the pleadings we had at pretrial?

Mr. Kirkpatrick:

Yes, your Honor. My understanding [133] is at pretrial there were admitted in evidence —

The Court:

The first six paragraphs.

Mr. Kirkpatrick:

—the first six paragraphs of the complaint, which perhaps I should read to the jury.

The Court:

Perhaps you better read those to the jury first, and then proceed with the other admissions, and then they will be in proper order. The first six paragraphs of your complaint are admitted.

Mr. Kirkpatrick:

I think I did say, your Honor, plaintiff offers in evidence, as being admitted in pretrial, the first six paragraphs of the complaint filed by the plaintiff in this case:

> "(1) Plaintiff is a national banking association organized and existing under the laws of the United States of America, and having its principal place of business in the City of San Francisco, San Francisco County, California."
>
> "(2) Defendant Arthur A. Rocco is a citizen of the Commonwealth of Pennsylvania and resides in the City of Pittsburgh, Allegheny County, Pennsylvania."

"(3) Defendant Gilbert S. Parnell is a citizen of the Commonwealth of Pennsylvania and resides in the City of Indiana, Indiana County, Pennsylvania."

"(4) Defendant First National Bank in Indiana is a national banking association organized and existing under the laws of the United States of America and having its principal place of bus- [134] iness in the City of Indiana, Indiana County, Pennsylvania."

"(5) Defendant Federal Reserve Bank of Cleveland is a corporation organized and existing under the laws of the United States of America, having its principal place of business in the City of Cleveland, Cuyahoga County, Ohio, and doing business in the Commonwealth of Pennsylvania through its branch bank located in the City of Pittsburgh, Allegheny County, Pennsylvania."

"(6) Jurisdiction is founded on diversity of citizenship, and the amount in controversy, exclusive of interest and costs, exceeds the sum of $3,000."

Now reading from the answer which was filed by Mr. Parnell in this case, paragraph 7(b) reads as follows:

Mr. Miller, Jr.:

I wonder if we might pause just a moment. I don't have a copy of the answer. I would like to look at it.

Mr. Harrison:

And I would like it understood, that is only offered as against Mr. Parnell?

Mr. Kirkpatrick:

No; it is offered against all of the defendants.

Mr. Harrison:

Well, I object on behalf of the Federal Reserve Bank.

Mr. Miller, Jr.:

Well, I would like to look at it for just a moment.

The Court:

Which paragraphs do you expect to read?

Mr. Kirkpatrick:

7(b), (c), (d) and (e); and 11(b), (c), (d) and (e), which relate to the second transaction; [135] and 12.

The Court:

What is the objection?

Mr. Duggan:

I haven't any objection, your Honor.

The Court:

I thought I heard an objection.

Mr. Miller, Jr.:

I am sorry, your Honor. I hadn't seen this.

The Court:

Is there any objection to the offer?

Mr. Miller:

I am checking, your Honor, because I think these

are identical to the facts we are going to offer to admit.

The Court:

They are all practically the same thing you have in your answer.

Mr. Miller, Jr.:

It is practically the same as we have in our answer, and I just have to check it as to the exact language.

Mr. Harrison:

I object on behalf of the Federal Reserve Bank of Cleveland, in that the admissions should be only as against Mr. Parnell.

Mr. Miller, Jr.:

May the Court please, I wonder if I might say that, subject to any minor variations as to dates here that might be in here, and a matter to be proved in the case, we have no objection to his reading this in evidence.

Mr. Kirkpatrick:

I expect to offer similar paragraphs of your answer, Mr. Miller.

[136] *Mr. Miller:*

I think they are similar; and I haven't had a chance to compare them as to accuracy.

The Court:

As far as the objection of the Federal Reserve Bank of Cleveland, do you have anything to say?

Mr. Kirkpatrick:

I am willing to offer them as to the other defendants than the Federal Reserve Bank of Cleveland.

The Court:

All right. Hearing no other objection, they are admitted.

Mr. Kirkpatrick:

Plaintiff offers in evidence—I think I stated previously—paragraph 7(b) of the answer of Mr. Parnell:

> "That on September 28, 1948, Gilbert S. Parnell, an Attorney, a Defendant named in the above case, delivered the said bonds described in Paragraph Seven of the Complaint to the other Defendant, First National Bank in Indiana, Pa., for redemption."

I think I perhaps might say to the jury, your Honor, that is referring to the bonds described in the complaint, which have been previously identified.

> "(c) That on said date, September 28, 1948, Defendant, First National Bank in Indiana, Pa., by registered mail, sent said bonds described in paragraph Seven of the Complaint to the Pittsburgh Branch of the Federal Reserve Bank, Fiscal Agent of the United States, Pittsburgh 19, Pennsylvania, for redemption."
>
> "(d) That the Pittsburgh Branch of the Federal Reserve Bank, Fiscal Agent of the United States, upon receipt of [137] said letter and said bonds for redemption on September 30, 1948, deposited to the credit of the First Na-

tional Bank in Indiana, Pennsylvania, the proceeds of said bonds, namely the sum of $19,600.00."

"(e) That thereafter, on October 1, 1948, First National Bank in Indiana, named as a Defendant in the above case, paid to Gilbert S. Parnell, Attorney, the sum of $19,500.00 (expense of $10.00 being deducted)."

I also offer in evidence paragraphs 11(b), (c), (d) and (e) of the answer of Gilbert S. Parnell, those paragraphs reading as follows:

"(b) That on October 25, 1948, Gilbert S. Parnell, an attorney, Defendant named in the above case, delivered said bonds described in Paragraph Eleven of the Complaint to First National Bank in Indiana, Defendant named in the above case, for redemption."

"(c) That on October 25, 1948, First National Bank in Indiana, Defendant named in the above case, by registered mail sent said bonds described in Paragraph Eleven of the Complaint to the Pittsburgh Branch of the Federal Reserve Bank, Fiscal Agent of the United States, Pittsburgh 19, Pennsylvania, for redemption."

"(d) That pursuant to the instructions of First National Bank in Indiana, Defendant named in the above case, the Pittsburgh Branch of Federal Reserve Bank, Fiscal Agent of the United States, upon receipt of said instructions and said bonds on October 26, 1948, deposited to the credit of the First National Bank in Indiana, the proceeds of said bonds, [138] namely, the sum of $38,000.00."

"(e) That, thereafter, on October 28, 1948, said First National Bank in Indiana, Defendant named in this case, paid to said Gilbert S. Parnell, Attorney, Defendant named in this case, the proceeds of said bonds (less $20.00 expenses), the sum of $37,980.00."

"12. That the said Gilbert S. Parnell, Defendant named in the above case, an Attorney, delivered to said Arthur A. Rocco the proceeds of said bonds described in Paragraph Seven and Paragraph Eleven of the Complaint, said bonds having been in turn delivered by Arthur A. Rocco to said Gilbert S. Parnell as Attorney to arrange for the redemption thereof."

Mr. Miller, Jr.:

Just a moment. I didn't hear him offer originally—was that paragraph 12 you last read from?

Mr. Kirkpatrick:

Yes. I offered in evidence paragraph 12 also, which I have just read to the jury.

Mr. Miller, Jr.:

In so far as that is offered in regard to the First National Bank in Indiana, we object to the competency, relevancy and materiality of it, and ask that the jury be instructed to disregard it. I didn't hear him offer it in such a way as to have a chance previously to object.

The Court:

Well, that can only be binding on the defendant that answered it.

Mr. Kirkpatrick:

Then, since there is objection, I will withdraw the offer of that paragraph as to the Bank of Indiana.

[139] *The Court:*

That is offered then as against Parnell only. Is that it?

Mr. Kirkpatrick:

No. I offered it against all of the defendants, your Honor, and there was no objection to those other paragraphs by any defendant.

The Court:

Well, the Court ruled on that part of it. And 12 was not included in that. Is that right?

Mr. Kirkpatrick:

No; that is correct.

The Court:

Now you offer 12?

Mr. Kirkpatrick:

I offer 12 against the defendant Gilbert S. Parnell and also as against the defendant Rocco.

Mr. Casey:

I can't see, if the Court please, how an admission by the defendant Parnell can bind the defendant Rocco.

The Court:

Well, it is admitted against Parnell. It is his answer. So we will admit it for that purpose. It is not admitted against the other defendants. The Court and jury understand that that is an answer

filed by one of the defendants, and that is what he said as to the transaction. The Court has admitted what he said for the consideration of the jury in this case.

Mr. Kirkpatrick:

The plaintiff offers in evidence the following paragraphs in the answer filed by First National Bank in Indiana, a defendant named in the above case: Paragraphs 7(b), (c), (d), (e); paragraphs 11(g), (h), (i) and [140] (j).

Mr. Miller, Jr.:

I think that is correct, and we will admit it, your Honor, as soon as I can get a copy of my answer to check the numbers accurately. —No objection, your Honor.

Mr. Harrison:

Object again on behalf of the Federal Reserve.

The Court:

I understand this admission is against the First National Bank in Indiana alone. Is that correct?

Mr. Kirkpatrick:

Well, my offer, your Honor, was against all the defendants except as to those who object. Now I take it Mr. Harrison has objected. And therefore I withdraw the offer as to his client.

The Court:

Well, all they have to do is object, and you will withdraw it?

Mr. Kirkpatrick:

That's right.

The Court:

Well, it is admissible. Let's proceed with the rules of pleading. We know it is admissible against the person who answered. And there being an objection, we will admit it against the First National Bank in Indiana.

Mr. Casey:

I object.

The Court:

Again, members of the jury, he is going to read from the answer of the First National Bank in Indiana. Of course the jury understands in a pleading—in a civil case the complaint and the answer are pleadings. Now he [141] is reading from the answer of the bank.

Mr. Kirkpatrick:

In the answer of the First National Bank in Indiana which was filed in this case, paragraph 7(b), the bank says:

> "(b) That on the 28th day of September, 1948, one Gilbert S. Parnell, an attorney, delivered the said bonds described in paragraph seven to the defendant, First National Bank in Indiana, for redemption."
>
> "(c) That on said date, September 28, 1948, defendant, First National Bank in Indiana, by registered mail sent said bonds described in paragraph seven to the Pittsburgh Branch of the Federal Reserve Bank, Fiscal Agent of the United States, Pittsburgh 19, Pennsylvania, for redemption. A photostatic copy of the letter

accompanying said bonds is hereto attached, made a part of this Answer, and is marked 'Exhibit 1.' "

At that point, your Honor, I would like to ask Mr. Harrison to produce the original of the letter received from the First National Bank in Indiana, and I will offer the original letter.

There are, I might say, your Honor, photostatic copies of certain documents referred to in this answer, and we have subpoenaed from the Federal Reserve Bank of Cleveland the original letter, for example, in this case, and from Mr. Miller's client, First National Bank in Indiana, the original of the documents which would be in their possession.

(Photostat marked Plaintiff's Exhibit No. 13.)

Mr. Kirkpatrick:

Plaintiff offers in evidence as its [142] Exhibit 13—

Mr. Duggan:

May I see that, Mr. Kirkpatrick, please? I have never seen it, of course. (Paper handed to Mr. Duggan.)

Mr. Kirkpatrick:

—a letter dated September 28, 1948, on the letterhead of the First National Bank, Indiana, Pennsylvania, addressed to Pittsburgh Branch, Federal Reserve Bank, Fiscal Agent of the United States, Federal Reserve Station, Pittsburgh 19, Pennsylvania, and signed by T. Edgar Walker, Assistant Cashier. A photostat has been marked as the exhibit, and I ask leave to substitute the photostat,

so that the original may be returned to the Federal Reserve Bank of Cleveland.

The Court:

Is that the letter that is referred to in 7(c) of this defendant's answer?

Mr. Kirkpatrick:

That is correct.

The Court:

All right. You may proceed.

Mr. Kirkpatrick:

This is a photostatic copy of the letter accompanying said bonds—that is, the bonds received on September 28—attached to and made a part of this answer. Plaintiff's Exhibit 13 is that letter. It is addressed as I have indicated in offering the letter, and says:

> "Gentlemen:
>
> "We enclose the following HOME OWNERS [143] LOAN CORPORATION 3% Bonds of the United States of America, Series A. We will ask you to credit our account with the proceeds."

Then follows a list of the bonds, the numbers being given of nine bonds of $1,000 each, eighteen bonds of $500 each, and sixteen bonds of $100 each.

And following, in paragraph 7(d) of the answer of the First National Bank in Indiana:

> "(d) That pursuant to the instructions in said letter, the Pittsburgh Branch of the Federal Reserve Bank, Fiscal Agent of the United

States, upon receipt of said letter and said bonds on the 30th day of September, 1948, deposited to the credit of the First National Bank in Indiana, Pennsylvania, *inter alia* the proceeds of said bonds, namely, the sum of $19,600.00. A photostatic copy of said credit deposit slip being hereto attached, made a part hereof, and is marked 'Exhibit 2.' "

I would like to call upon the defendant First National Bank in Indiana to produce the original of that deposit slip, so that it may be offered as Plaintiff's Exhibit 14.

Mr. Miller, Jr.:

I believe the Federal Reserve Bank has the copies of the deposit tickets. We have photostats here that are available, if you wish to use them.

Mr. Harrison:

I don't know which is the ribbon copy and which is the carbon (producing papers).

Mr. Kirkpatrick:

If the Court please, Mr. Harvey Miller, Jr., informs me that they have not been able to lo-
[144] cate the original of this credit advice. He has supplied me with what purports to be a photostatic copy of the document, and I have asked the reporter to mark that as Plaintiff's Exhibit 14.

(Photostat marked Plaintiff's Exhibit No. 14.)

Mr. Miller, Jr.:

May the Court please, I think the original of the credit memo is retained in the possession of the Federal Reserve Bank, Pittsburgh Branch, and

which they have here produced. What was unable to be located was the carbon copy which was forwarded on to the bank in Indiana. So that I think as far as that is concerned the photostat which we have furnished is—

The Court:

There won't be any question about it.

Mr. Kirkpatrick:

I think the allegation in the complaint was that this credit slip—a certain credit slip was received by the bank. Now, I ask the bank to produce its original of that credit slip. My understanding is that this is a multiple form made up by the Federal Reserve Bank, and that one of those would have gone to the First National in Indiana. And I subpoenaed the original of it in their possession, which I have not received.

Mr. Miller, Jr.:

May the Court please, as a matter of the previous handling of these papers, we have been unable to locate the copy which was sent to us. But we have submitted the photo copy, which was made prior to the time [145] that that slip went out of our possession.

Mr. Kirkpatrick:

Was this one made, Mr. Miller, from the copy in your possession, do you know?

Mr. Miller, Jr.:

Just a moment; I will check. I have no doubt that it was, but I will check here to make absolutely sure.

Mr. Kirkpatrick:

If you haven't got the one that was in your possession, how are you going to check?

Mr. Miller, Jr.:

Yes, that is the one.

Mr. Kirkpatrick:

How do you know it?

Mr. Miller, Jr.:

It was furnished to us in order to prepare an answer in this case.

Mr. Kirkpatrick:

By whom?

Mr. Miller, Jr.:

By the First National Bank in Indiana.

Mr. Kirkpatrick:

You don't know where the original is now?

Mr. Miller, Jr.:

No. I have said I do not—not the original. I know where the original is now. I do not know where the copy that was furnished to the First National Bank in Indiana is now.

Mr. Kirkpatrick:

Plaintiff will offer in evidence this photostat, your Honor, in view of the explanation of the attorney for the bank.

The Court:

Received.

[146] *Mr. Kirkpatrick:*

Members of the jury, this is a credit slip, which

I will hand you. And it advises the First National Bank in Indiana the Federal Reserve Bank has credited to the account of First National Bank in Indiana under date of September 28, 1948—or pursuant to a letter received, being the letter which was offered as Plaintiff's Exhibit 13: Proceeds redemption 3% Home Owners Loan Corporation Bonds Series A 1944-52 $19,600.00. You will note that this also refers to certain other bonds, but they are not involved in this suit.

Now proceeding with paragraph (e):

> "(e) Thereafter, on October 1, 1948, First National Bank in Indiana, named as a defendant in the above case, paid to the said Gilbert S. Parnell, attorney (less $10.00 expenses), the sum of $19,590.00. A photostatic copy of the cashier's check in payment thereof to said Gilbert S. Parnell is hereto attached, made a part hereof, and is marked 'Exhibit 3.' "

And I ask counsel for the bank to produce the original check described in that answer.

Mr. Miller, Jr.:

I have produced the original, and ask you to replace it with a photostat.

(Photostat marked Plaintiff's Exhibit No. 15.)

Mr. Kirkpatrick:

If the Court please, plaintiff offers in evidence as Plaintiff's Exhibit 15 a cashier's check on the First National Bank in Indiana, dated October 1, 1948, payable to Gilbert S. Parnell, Sr., Attorney at Law, the [147] amount of the check being $19,590. I have agreed with Mr. Miller to return the original of the

check, so I will offer the photostat, if there is no objection, and return the original after it has been exhibited to the jury.

The Court:

All right. Proceed in that fashion.

Mr. Kirkpatrick:

The check, members of the jury, which has been offered as an exhibit by the plaintiff, is handed for your inspection, and is self-explanatory.

Now, coming down to the second, the October transaction, I will read paragraph 11(g) of the answer of the Bank of Indiana:

> "(g) That on the 25th day of October, 1948, one Gilbert S. Parnell, an attorney, delivered said bonds described in paragraph seven to the defendant, First National Bank in Indiana, for redemption."
>
> "(h) That on October 25, 1948, said defendant, First National Bank in Indiana, by registered mail sent said bonds described in paragraph eleven to the Pittsburgh Branch of the Federal Reserve Bank, Fiscal Agent of the United States, Pittsburgh, Pennsylvania, for redemption. A photostatic copy of the letter accompanying said bonds is hereto attached, made a part of this Answer, and is marked 'Exhibit 4.'"

I will ask Mr. Harrison to produce the original of the letter of October 25, 1948.

(Photostat marked Plaintiff's Exhibit No. 16.)

Mr. Kirkpatrick:

Plaintiff offers in evidence as Plaintiff's Exhibit 16 a letter dated October 25, 1948, ad- [148] dressed

to Pittsburgh Branch, Federal Reserve Bank, Fiscal Agent of the United States, Federal Reserve Station, Pittsburgh 19, Pennsylvania, and reading as follows:

"Gentlemen:

"We enclose herewith the following HOME OWNERS LOAN CORPORATION 3% Bonds of the United States of America Series A. You will please credit our account with the proceeds."

And then follows two bonds of $5,000 each, with certain numbers listed on the exhibit, and twenty-eight bonds of $1,000 each numbered, and a list of numbers then appears. Mr. Harrison has asked me to stipulate—which I am glad to do, your Honor—not only with respect to this letter of transmittal, which is Exhibit 16, but the earlier one in September, which I think is Exhibit 14, that the handwriting other than the signature on this letter was not on the letter at the time the letters were received by the Federal Reserve Bank.

The Court:

Let that be understood. The letter is admitted in evidence.

Mr. Kirkpatrick:

Now, paragraph 11(i) of the answer of the bank, reading as follows:

"(i) That pursuant to the instructions in said letter, the Pittsburgh Branch of Federal Reserve Bank, Fiscal Agent, upon receipt of said letter and said bonds on the 26th day of Octo-

ber, 1948, deposited to the credit of the First National Bank in Indiana, the proceeds of said bonds, [149] namely, the sum of $38,000.00. A photostatic copy of said credit deposit slip being hereto attached, made a part hereof, and is marked 'Exhibit 5.' "

And I call upon counsel for the bank to produce the credit which was received by the bank, the original.

Mr. Miller, Jr.:

The same circumstances exist as to this credit slip that existed as to the other, and I confirm my statement that this is a photostatic copy of the original which it was received, and it is identical in tenor with the original typewritten slip of that in the hands of the Federal Reserve Bank.

(Photostat marked Plaintiff's Exhibit No. 17.)

Mr. Kirkpatrick:

If the Court please, plaintiff offers in evidence as its Exhibit No. 17 a credit advice dated October 26, 1948, relating to the credit made by the Federal Reserve Bank, Pittsburgh, in favor of the First National Bank, Indiana, Pennsylvania, in the amount of $38,000.

Now coming down to (j), paragraph 11(j), which plaintiff offers in evidence:

"(j) Thereafter, on the 28th day of October, 1948, the First National Bank in Indiana, named as a defendant, paid to the said Gilbert S. Parnell, attorney, the proceeds received for said bonds (less $20.00 expenses), the sum of $37,980.00. A photostatic copy of the cashier's check in payment thereof to said Gilbert S. Par-

nell is hereto at- [150] tached, made a part hereof, and is marked 'Exhibit 6.' "

And I call upon the counsel for the bank to produce the original of the check that is described in that paragraph.

Mr. Miller, Jr.:

Unfortunately, the same circumstances exist as to that. However, this photostat was made of that check, and we have that in our possession, and confirm that that is an exact photostat of the original.

Mr. Kirkpatrick:

Well, I don't know that I am willing to accept that as testimony, your Honor, as to when the photostat was made. We have called for it—

The Court:

Did you subpoena it?

Mr. Kirkpatrick:

We did, sir.

The Court:

Then why isn't it produced?

Mr. Miller, Jr.:

May the Court please, we don't have it. I would be willing to explain this as a matter of full detail at side bar.

Mr. Casey:

I am surprised at Mr. Kirkpatrick. These checks have been in many other hands.

The Court:

Well, isn't a photostat just as satisfactory for your purposes?

Mr. Kirkpatrick:

I have never seen the original, your Honor. I don't know whether it is or not. I don't know when this photostat was made or what is on the original. I would like to see the original, if it is available; now, [151] if it isn't, I will offer the photostat.

Mr. Casey:

It seems to me that isn't material.

Mr. Miller, Jr.:

It is an exact duplicate.

Mr. Kirkpatrick:

I don't know whether Mr. Miller ever saw the original or not, or when he made these. I think it requires some explanation of where the original is.

The Court:

It is under subpoena. And if counsel is persistent on it I just can't turn him off, without some explanation. If you are satisfied with it, then why not offer some explanation of why it can't be here.

Mr. Casey:

Mr. Kirkpatrick knows—I will state openly—these matters have been the subjects of other proceedings. And if he wants to persist in it, that is up to him. I will ask that he do it in the regular way, call the witnesses under oath and proceed to ask them why it isn't here, so we can get it, and I will call for an offer when it affects my client. But if he wants to persist—he knows what happened to it evidently—

Mr. Kirkpatrick:

No, I do not. I do not, Mr. Casey, know what happened to it.

Mr. Casey:

I am willing to tell him privately. Well, have you any reason to doubt, Mr. Kirkpatrick, that that is not a photostat of a check, purporting to be what it is, irrespective of where it is. There is no—

Mr. Kirkpatrick:

I have never seen the original check, [152] Mr. Casey.

Mr. Casey:

Well, I say I have. So—I have seen it.

Mr. Kirkpatrick:

I think we might as well proceed, your Honor. I will proceed with the photostat.

The Court:

All right. Proceed with the photostat.

(Photostat marked Plaintiff's Exhibit No. 18.)

Mr. Kirkpatrick:

Plaintiff offers in evidence as its Exhibit No. 18 a photostatic copy of a cashier's check of First National Bank in Indiana, dated October 28, 1948, payable to G. S. Parnell, Attorney, the amount of the check being $37,980.00.

The Court:

All right. At this time, Mr. Kirkpatrick, we will suspend.

Now, members of the jury, of course I think it is very obvious to you at this time, after you have heard this much of the evidence in this case, as to why you should not make up your minds or discuss the case among yourselves until you have heard it all, because you can't judge this case until you hear all of it. So you will bear in mind the other instructions the Court has given yesterday, and they will apply all during the case. At this time we will recess until two o'clock.

(Whereupon, at 12:30 o'clock P. M. a recess was taken until 2:00 o'clock P. M.)

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[153] Tuesday, October 12, 1954
2:00 p. m.

AFTERNOON SESSION.

Mr. Kirkpatrick:

May it please the Court, plaintiff offers in evidence paragraphs 4(e), (f) and (g) of the answer filed in this case by the defendant, Federal Reserve Bank of Cleveland, and I request permission to read them to the jury.

The Court:

Any objection, Mr. Harrison?

Mr. Harrison:

I think that takes some of the paragraphs out of context. If counsel is going to offer them, he would have to include (b) and (c), and (f) and (g), at least.

Mr. Duggan:

He started with (b).

Mr. Harrison:

No, (c).

The Court:

Which ones did you propose to read, Mr. Kirkpatrick?

Mr. Kirkpatrick:

(c), (f) and (g), your Honor.

Mr. Harrison:

If he takes (b), (c), (f) and (g), I will not object.

Mr. Kirkpatrick:

I will take those; (b), (c), (f) and (g).

The Court:

Proceed that way.

Mr. Kirkpatrick:

This is the answer, members of the jury, filed by the Federal Reserve Bank of Cleveland. The [154] paragraphs which I want to read are, first, 4(b), which reads this way:

> That on September 30, 1948 defendant Federal Reserve Bank of Cleveland received at its Pittsburgh Branch, by mail, from defendant First National Bank in Indiana, the bonds identified in paragraph 7 of the complaint for redemption according to the letter dated September 28, 1948 from said defendant First National Bank in Indiana accompanying said bonds, a photostatic copy of which letter is hereto at-

tached marked "Exhibit 1" and made a part of this answer.

That letter to which reference is made is the letter of September 28, 1948, which has been offered in evidence in connection with the answers of the other defendants.

The Court:

That is understood.

Mr. Harrison:

Exhibit 13, I believe it is.

Mr. Kirkpatrick:

Exhibit No. 13, is it, Mr. Harrison?

Mr. Harrison:

I believe so.

Mr. Kirkpatrick:

Yes, that is my recollection, that it is Exhibit 13.

(c) That pursuant to the instructions in said letter marked "Exhibit 1" to this answer, —our Exhibit 13— the Federal Reserve Bank of Cleveland through its Pittsburgh [155] Branch, acting as Fiscal Agent of the Home Owners' Loan Corporation and Fiscal Agent of the United States, upon receipt of said letter marked "Exhibit 1" to this answer and of said bonds on the 30th day of September, 1948, deposited to the credit of said First National Bank in Indiana, Pennsylvania, the proceeds of said bonds in the sum of $19,600.00, and mailed to said First National Bank in Indiana a credit deposit slip of which

there is attached hereto a photostatic copy marked "Exhibit 2" and made a part of this answer.

And the credit slip to which reference is made is the Exhibit 14 in this case.

Is that correct, Mr. Harrison?

Mr. Harrison:

Correct.

Mr. Kirkpatrick:

Paragraph 4(f). This relates to the October bonds.

(f) That on October 26, 1948 defendant Federal Reserve Bank of Cleveland received at its Pittsburgh Branch, by mail, from defendant First National Bank in Indiana, the bonds identified in paragraph 11 of the complaint for redemption according to the letter dated October 25, 1948 from said defendant First National Bank in Indiana accompanying said bonds, a photostatic copy of which letter is hereto attached marked "Exhibit 3" and made a part of this answer.

That letter is Exhibit 15, is it?

Mr. Harrison:

Exhibit 16.

[156] *Mr. Kirkpatrick:*

Paragraph 4(g).

That pursuant to the instructions in said letter marked "Exhibit 3" to this answer, the Federal Reserve Bank of Cleveland through its Pittsburgh Branch, acting as Fiscal Agent of the

Home Owners' Loan Corporation and Fiscal Agent of the United States, upon receipt of said letter marked "Exhibit 3" to this answer and of said bonds on the 26th day of October, 1948, deposited to the credit of said First National Bank in Indiana, Pennsylvania, the proceeds of said bonds in the sum of $38,000.00, and mailed to said First National Bank in Indiana a credit deposit slip of which there is attached hereto a photostatic copy marked "Exhibit 4" and made a part of this answer.

I think we will agree that Exhibit 4, to which reference is here made, is the credit slip which was offered in evidence as Exhibit 17.

If the Court please, I ask counsel for the several defendants to stipulate that the seventy-three bonds involved in this suit were identical to Exhibit 1 except for serial numbers and denominations, and that at all times involved the November 1, 1944, and all subsequent coupons were attached.

The Court:

That matter was discussed at pretrial.

Mr. Kirkpatrick:

It is my understanding that they indicated their willingness to so stipulate, at pretrial.

The Court:

It was settled at pretrial.

Mr. Duggan:

That is right. It was agreed to.

[157] *The Court:*

It was agreed to at pretrial, and that is the fact.

Mr. Duggan:

That is right.

Mr. Harrison:

I am not sure about all the coupons being attached. I'd like to inquire. I believe the rest is correct.

The Court:

All right.

Mr. Kirkpatrick:

This matter was not covered at pretrial, your Honor, but I understand there is no objection.

The Court:

Didn't we talk about the bonds at pretrial?

Mr. Kirkpatrick:

The next matter to which I am going to refer.

The Court:

Let's see what Mr. Harrison says.

Mr. Harrison:

I believe that is correct.

The Court:

All right. That is understood to be in evidence.

Mr. Kirkpatrick:

Next, I would call upon counsel for the several defendants to stipulate that on or about January 26, 1951, plaintiff, through its counsel, made demand on each of the defendants for the sum of $57,600.00, with interest, by reason of the alleged conversion of the bonds here in suit, and that said demands were refused by each of the defendants.

Mr. Duggan:

That is self-evident, your Honor.

[158] *The Court:*

Is that the date suit was filed?

Mr. Kirkpatrick:

No. It is sometime prior to suit, your Honor.

Mr. Duggan:

The suit indicates that that was the demand, and that is as far as we will go on that.

Mr. Kirkpatrick:

I am asking them to stipulate, your Honor, in lieu of offering the letters.

The Court:

There is no question about it, is there, gentlemen?

Mr. Miller:

No question.

Mr. Duggan:

That is the issue here, isn't it, your Honor?

The Court:

That is right. I think it has always been held that suit is sufficient.

Mr. Casey:

As far as defendant Rocco is concerned, suit is the first demand that I know.

Mr. Kirkpatrick:

Oh, no. (Paper shown to counsel.)

The Court:

What date did you say? I notice your complaint is filed February 15, '51.

Mr. Kirkpatrick:

This is January 26, 1951.

The Court:

It is only three weeks from your complaint. Your complaint was filed February 15. Does that three weeks make any difference?

Mr. Kirkpatrick:

The three weeks? No. I offer the demand, your Honor, because there is some indication [159] that as a technical matter in an action for conversion demand and refusal in certain circumstances is an element of the case.

Mr. Duggan:

I think the offer is entirely objectionable, your Honor. The mere fact that plaintiff makes a demand on a defendant is no justification for assuming that that demand is proper.

Mr. Kirkpatrick:

I don't claim that.

Mr. Duggan:

The mere fact that a demand is made is certainly something we can't—if we reject it, we would have reasonable grounds for doing so, I would think. I don't think that is an element in this case at all.

Mr. Kirkpatrick:

I am not contending, your Honor, that their refusal is in any way an indication that they thought my suit was good or bad or indifferent. I am merely asking them to stipulate that I did make demand on them, and their refusal.

Mr. Casey:

Defendant Rocco will so stipulate.

Mr. Harrison:

We have your letter dated January 26.

Mr. Kirkpatrick:

That is correct.

Mr. Harrison:

Yes. We received it January 29.

The Court:

Demand was made on the Federal Reserve Bank January 29?

Mr. Miller:

We admit that. Demand was made and refusal by the Bank in Indiana.

[160] *The Court:*

All right. That is in the record.

Mr. Duggan:

If you think that is material, your Honor, we will admit it too, that demand was made on Mr. Parnell.

The Court:

Very well.

Mr. Kirkpatrick:

If your Honor please, on November 17, 1952, there was taken in New York City the deposition of two officials of the Federal Reserve Bank of New York, namely Walton Brush and James K. Flannagan. I believe the originals of those depositions have been returned to the Court, and at this time

I would offer in evidence those depositions and the exhibits attached thereto.

Mr. Harrison:

We object to those depositions, your Honor. We would like to be heard on them.

The Court:

Those are two individuals, as I understand it.

Mr. Kirkpatrick:

They are employees, your Honor, of the Federal Reserve Bank of New York, who are testifying in connection with a—

Mr. Miller:

Just a minute.

I wonder if we can't be heard on this without the jury.

The Court:

Let me look at them.

Come to side bar, gentlemen. We will see what this is about.

[161] (At side bar.)

The Court:

Who are these people, now?

Mr. Kirkpatrick:

These are two officials of the Federal Reserve Bank of New York, who were in charge of checking the lists against bonds that were turned in. This testimony relates to what they did when they had notice of the theft of some of these one hundred thousand dollars worth of bonds, what the procedure

was in checking those lists, and that by checking them they discovered that $20,000 of the bonds were on this list, and payment was refused, the person presenting them was picked up, and later convicted and sentenced. Those are part of this hundred thousand dollars of bonds.

The Court:

How does that apply to this case?

Mr. Kirkpatrick:

It is offered, your Honor, in connection and as corroboration of the proof against the Federal Reserve Bank of Cleveland, primarily, that here was a sister bank, which also received a notice, and what it did with the notice.

The Court:

According to your own case, every bank in the country received that notice. Are you going to prove what every other bank did?

Mr. Kirkpatrick:

No.

The Court:

I still don't see the relevancy in this issue.

[162] *Mr. Kirkpatrick:*

I think it is relevant in several issues, your Honor. In the first place—

The Court:

In the first place, it is not an admission by anybody in this case.

Mr. Kirkpatrick:

No.

The Court:

It is not an admission by any individual, no officer. You have a different corporation.

Mr. Kirkpatrick:

Federal Reserve Bank.

The Court:

Each one of these Reserve Banks is separately incorporated.

Mr. Harrison:

They are twelve separate corporations.

Mr. Kirkpatrick:

We come back to another element in the case, and that is on the proof that the bonds were stolen. You will remember that in the Circuit Court, the Circuit Court relied on the fact that all bonds gravitated to Rocco, as evidence of the fact that these bonds were stolen. We say that when we produce evidence that a portion of the bonds, stolen on this same day and as a part of our bonds, turn up down in New York, and a man is convicted of that, that it is, under the Circuit Court ruling, affirmative evidence of the theft.

The Court:

In that case, he was convicted not only of stealing these bonds but some other bonds that turned up in New York, and in order to prove that, as I understand, they had to go around and show what happened. But [163] in this case, we are away from that other transaction. You are down to the bonds that were taken from your bank, and you have your testimony in.

Mr. Kirkpatrick:

I think that is probably right. I think this would probably come in, if it doesn't come in now, your Honor, as a matter of credibility. But that is another question.

The Court:

I don't think it is admissible now.

Mr. Kirkpatrick:

For the record, to save time, I have had typed out an offer on the thing, with a copy to your Honor and also to counsel.

(Paper handed to Court and counsel.)

The Court:

If you had the Federal Reserve Bank in Cleveland testify to all that, you might be in better position.

Mr. Kirkpatrick:

I suppose, if Mr. Harrison is still here, he is going to say this is an unimportant matter.

Mr. Harrison:

I think the offer is subject to the same objection as the deposition itself. I object to the offer on the same grounds that I object to the deposition.

You propose to prove this by the depositions, so it is the same thing.

Mr. Kirkpatrick:

We can make the offer on the record. Let me put it on the record, Mr. Harrison.

[164] *Mr. Harrison:*

Surely.

The Court:

I understand he has made his offer.

Mr. Kirkpatrick:

For convenience, I will merely let the reporter type this.

Mr. Harrison:

I don't think it should be read in the presence of the jury.

Mr. Kirkpatrick:

I don't propose to do that.

The Court:

Let's go on. I understand you are making the offer then and presenting to the reporter the offer as indicated on the slip of paper.

Mr. Kirkpatrick:

I will just give her this, and I understand your Honor will refuse it at this time.

Mr. Harrison:

And note my objection.

The Court:

The objection is on the record and the objection is sustained.

(Written offer above referred to follows:)

Offer of Proof *in Re* Depositions of Officials of Federal Reserve Bank of New York

We offer to prove by the testimony of Walton Brush, Chief of the Government Bond Division,

Government Bond Department, of the Federal Reserve Bank of New York, that that Bank had been advised of the theft from the Bank of America, plaintiff, of $100,225 principal amount of HOLC Bonds in the form of a notice from the F. B. I., New York, dated May 8, 1944, [165] and also in the form of a letter from the Undersecretary of the Treasury dated May 15, 1944, to which was attached a letter of May 3, 1944 from the Bank of America and another letter of May 4, 1944, from the Bank of America, together with a schedule of the stolen bonds; that the F. B. I. notice was sent by the Federal Reserve Bank of New York to its only branch office, namely, the one in Buffalo, on May 17, 1944; that the F. B. I. notice of May 8, 1944, was considered an important matter, and the Buffalo Branch was kept informed of all important matters; that a Vice President of the Federal Reserve Bank of New York acknowledged the letter from the Treasury Department of May 17, 1944, and advised that in accordance with their request "we shall be on the look-out for any of these bonds, and should they be presented to us in any way we shall be guided by instructions set forth in your letter"; that a copy of the F. B. I. notice of May 8, 1944 was given to the Issues and Redemptions Section of the Government Bond Division and a copy was given to the Sorting Section of the Government Bonds Division so that the notice could be

examined at the end of each day to ascertain whether any [166] bonds received during the day were on the list; that it was the established procedure of employees of these sections to make such a daily check and they were verbally instructed to bring to the attention of Mr. Brush or the Manager of the Department any securities that might be found on the list; that on May 23, 1946, $20,000 principal amount of HOLC bonds stolen from the plaintiff were presented for payment by Manufacturers Trust Company on the standard form of Application for Redemption; that at the end of the day, in making the daily check of caveat lists including the F. B. I. notice, a teller in the Issues and Redemption Section discovered that said $20,000 of bonds were on the F. B. I. list; that the teller then immediately notified the Supervisor of the Issues and Redemption Section, a Mr. Flanagan, and that Mr. Brush was also notified; that, thereupon, the Federal Reserve Bank of New York, through Mr. Flanagan, telephoned the Chief of the Division of Loans and Currency at the Treasury Department in Washington and received oral and telegraphic permission to turn the bonds in question over to the Federal Bureau of Investigation for investigation; that the bonds were turned over to the [167] F. B. I. on May 28, 1946; that the Federal Reserve Bank notified the Manufacturers Trust Company that they were not honoring the bonds; that, ultimately,

the persons who presented the bonds to the Manufacturers Trust Company were prosecuted and found guilty; and that, finally, the bonds in question were redeemed by a check drawn on the Treasury of the United States in the amount of $20,000 to the order of Manufacturers Trust Company for the account of Bank of America National Trust and Savings Association, the plaintiff in this case.

We further offer to prove through the testimony of James K. Flanagan, Supervisor of the Issues and Redemptions Section of the Government Bond Division of the Federal Reserve Bank of New York, and an employee of the Bank for 36 years, that they considered the F. B. I. notice of May 8, 1944 to be extraordinary both in connection with the amount of the stolen bonds which it showed and also in the fact that it came from the Federal Bureau of Investigation; that it was placed in the caveat file of his Section to be checked at the end of each day; that upon notification by [168] the teller that the bonds appeared on the F. B. I. list, he personally checked the bond numbers against said list; that it is everybody's job in the Section to make such a daily check; that on the same day the bonds were presented he called the Treasury Department in Washington and, upon telling them that these bonds had turned up, was instructed not to make payment of them; that on the same day another officer of the Bank notified the F. B. I. in New York, and on the following

day Flanagan was advised by the Treasury that the F. B. I. in Washington had been notified; that on May 28, the bonds were turned over to the representative of the F. B. I.

(In open court.)

Mr. Kirkpatrick:

We have made an offer which has been entered, your Honor, on which I understand that the deposition has been refused at the present time.

Mr. Miller:

I'm sorry. I can't hear you.

Mr. Kirkpatrick:

I am saying I understood that we had made an offer on the record, with respect to the deposition of Walton Brush and James K. Flanagan, and which offer was refused at this time.

[169] *Mr. Kirkpatrick:*

If the Court please, I would like to call at this time Mr. Hallford, from the Federal Bureau of Investigation, and ask permission to have Mr. Pomeroy examine him. He has talked with the witness.

The Court:

All right. Proceed.

FRED HALLFORD, called as a witness on behalf of the plaintiff, having been duly sworn, testified as follows:

Direct Examination:

By Mr. Pomeroy:

Q. Will you state your full name, please, Mr. Hallford?

A. Fred Hallford.

Q. Where do you live?

A. I live in Mt. Lebanon, Pennsylvania.

Q. By whom are you employed?

A. I am employed by the Federal Bureau of Investigation.

Q. Of the Department of Justice of the United States?

A. That is right.

Q. How long have you been employed by the Federal Bureau of Investigation?

A. Approximately seventeen years.

Q. And what is your position with the Bureau, at this time?

A. I am Special Agent in Charge of the Pittsburgh Division.

Q. What is the extent or area covered by the Pittsburgh Division, Mr. Hallford?

[170] A. The Pittsburgh Division embraces those counties that lie in the western federal judicial district of Pennsylvania and the State of West Virginia.

Q. In other words, in so far as Pennsylvania is concerned, is the geographical area covered by your office coextensive with that of the District Court of the United States for the Western District of Pennsylvania?

A. That is correct.

Q. Is the city or town of Indiana, Pennsylvania, within the geographical area that we have just discussed?

A. Yes, sir.

Q. How long have you been in charge of the Pittsburgh office, Mr. Hallford?

A. I arrived and took over duties as agent in charge at Pittsburgh approximately September 20, 1951. I am not sure of that exact date. But around September 20.

Q. You had been associated with the Pittsburgh office prior to that time?

A. No, sir.

Q. Mr. Hallford, I show you a paper which has been previously marked and offered in evidence in this case as Plaintiff's Exhibit No. 10, being a photostatic copy, together with the original of which Exhibit 10 is a copy, and which has been produced by the Federal Reserve Bank of Cleveland, Pittsburgh branch, one of the defendants in this case, as [171] having been received by that bank from the Federal Bureau of Investigation. You will note that it is dated Pittsburgh, Pennsylvania, May 20, 1944, and is headed, "To All Banks," or rather addressed to "All Banks and Security Brokers." And then following the message, in the notice, it is signed "Very truly yours, H. T. O'Connor, Special Agent in Charge." Will you tell us, please, whether you know Mr. O'Connor?

A. Yes, sir.

Q. Know who he is?

A. I am personally acquainted with Mr. O'Connor.

Q. And you know him to have been the special agent in charge of the Pittsburgh Division office of the F. B. I. on May 20, 1944?

A. I couldn't specifically state that he was in charge here in May of 1944, but I know that he was in charge in the Pittsburgh Division for some time, several years ago.

Q. Did you immediately succeed him?

A. No, sir. There have been several people in the Pittsburgh office since Mr. O'Connor was here.

Q. And do you know where Mr. O'Connor is now?

A. From general knowledge, he is employed in a private concern and left our organization, a few years ago.

Q. I see. This notice having been issued, according to its date, in 1944, is something, of course, that was done

prior to your coming to Pittsburgh and of which you would [172] have no personal knowledge. Is that correct?

A. That is right.

Mr. Duggan:

May I see it, Mr. Pomeroy? There may not be any necessity of worrying about whether it is competent or not.

Your Honor, we would waive any question about—

The Court:

Just a minute, Mr. Duggan, if you don't mind. He hasn't reached any point where there is any call for interruption at this time.

Mr. Duggan:

I wanted to expedite the matter.

The Court:

Let's see what he is going to do.

Mr. Duggan:

Very well.

The Court:

Until it gets to the point where we need an interruption, let's not have it.

Q. Mr. Hallford, directing your attention to the way this communication is addressed, namely, "To All Banks and Security Brokers," will you tell us, please, what is meant by the term, "To All Banks"?

Mr. Duggan:

That is objected to as incompetent, irrelevant and immaterial. The letter speaks for itself, and the question is whether or not the First National Bank in Indiana received the communication concerning which the witness is now being interrogated.

The Court:

Mr. Pomeroy, I think that is a self-evident proposition, as to what is meant by "all banks." [173] I don't think that needs the testimony of Mr. Hallford, to enable the Court and jury to understand what that means. Objection sustained.

Mr. Pomeroy:

As I understand the situation of this morning, your Honor, we offered this document, Plaintiff's Exhibit 10, but the offer was refused.

The Court:

That is right.

Mr. Pomeroy:

One of the reasons, at least, that it was refused was because of the fact that as of that time at least it was not shown to whom the letter was sent, or to whom the communication was sent. Now, this is an attempt to qualify the letter, as an admissible exhibit, along those lines.

The Court:

You have asked him for a definition of "banks."

Mr. Pomeroy:

I am asking him in connection with a particular notice.

The Court:

Do you propose to show by this witness that it was mailed to one of these defendants?

Mr. Pomeroy:

I want him to tell the Court and jury—

Mr. Miller:

If the Court please, I'd like to call for an offer in this.

Mr. Pomeroy:

I have already made an offer. I am asking him to tell the Court and jury, from his knowledge of F. B. I. procedures, practices, what the words, "To All [174] Banks" mean, in a notice.

The Court:

It wouldn't indicate the mailing.

Mr. Pomeroy:

It may not indicate any mailing.

The Court:

Do I understand from the witness that he can testify that the F. B. I. records in this district show it was mailed to all banks, at that time?

Mr. Pomeroy:

I haven't interrogated him about that, as yet.

The Court:

I think that is the issue, not the definition. I think the question as put is objectionable. I will sustain the objection. If you offer anything further, it might be admissible in this case.

Mr. Pomeroy:

Just to pin that down a little further, if the Court please, let me try to ask this question.

Q. Does the Federal Bureau of Investigation, from your knowledge of its operations in your seventeen years of experience with it, maintain mailing lists of banks in the various divisions where the Bureau operates?

A. Yes, as a general practice we do maintain lists of various banks within each separate field division.

Mr. Duggan:

I ask that that answer be stricken, because the only material inquiry here is in connection with what was done with reference to the First National Bank in Indiana.

The Court:

You are correct, Mr. Duggan, but I think [175] this may lead to that, so the objection is overruled.

Mr. Duggan:

Very well, sir.

The Court:

That is admitted.

Q. Mr. Hallford, may I ask you further in the same connection whether, when the F. B. I. mails a notice to all banks, that includes all banks within the division?

A. As a general practice—

Mr. Miller, Jr.:

May the Court please, I have refrained—

The Court:

Come to side bar, gentlemen. We will see where we are at.

Mr. Miller, Jr.:

Thank you, your Honor.

(At side bar.)

The Court:

What do you propose to show?

Mr. Pomeroy:

Mr. Miller objected this morning, if I understood

him, on the ground that there was no showing that they could be bound by this notice.

The Court:

Both of you seem to misconstrue what the Court had in mind. I had in mind this: That you took that from the Federal Reserve Bank's file. There is no showing that it was ever mailed to these banks in this area. I think it is incumbent upon you to show by an office record or some sort of a record that it actually went out to the banks in the area. It might be different if you could show that it was mailed to one of the banks in the [176] area. All you have so far is that it came to the Federal Reserve Bank in Cleveland, and you can't use what they received as evidence against the other defendants.

If this man can testify from his own records, if he can testify from the business records of the F. B. I.—

Mr. Kirkpatrick:

We can ask him if he can tell from his files.

The Court:

They have the record of that investigation. If he hasn't looked at it yet, let him look at it and come back.

Mr. Pomeroy:

That is where we get into trouble with the F. B. I. We can try.

The Court:

That is the point. It is a simple proposition of proof, as I see it. If you can't prove it, you can't prove it.

Mr. Miller:

I don't like to be an obstructionist, but there are certain things. There is no foundation at all for this.

(In open court.)

Q. Mr. Hallford, you are appearing here, I believe, pursuant to subpoena, which we served upon you?

A. That is correct.

Q. The subpoena asked you to produce all the files of the Federal Bureau of Investigation relative to investigation by your office of the loss or theft of $100,225 principal [177] amount of Home Owners' Loan Corporation three per cent Series A bonds, dated May 1, 1934, due May 1, '52, callable on or after May 1, 1944, from the Los Angeles main office of the Bank of America National Trust and Savings Association, on or about May 2, 1944. Will you state whether or not you have brought the files of the Federal Bureau of Investigation with you at this time?

A. No, sir, I have not brought them with me, at this time.

Q. And that, I believe is by reason of consulting your counsel, who is the Assistant United States Attorney. Is that right?

A. It is by reason of my knowledge of a departmental order, No. 3229 of the Attorney General, and consultation with Mr. Malcolm Anderson, the Assistant United States Attorney.

Q. You advised me before taking the stand that you had not brought them with you?

A. Yes, sir.

Q. Pursuant to the subpoena?

A. Yes, sir.

Q. For that reason?

A. Yes, sir.

Q. Now, whether you brought them with you or not, have you had an opportunity to look at the Pittsburgh Division office of the F. B. I. files, sufficient to identify the persons to whom the notice, which you have in your hand, Plaintiff's Exhibit No. 10, was sent, on May 20, 1944?

[178] *Mr. Duggan:*

That is objected to as incompetent, irrelevant and immaterial, and not being the best evidence, and generally as to the defendants as being hearsay.

The Court:

Objection overruled.

You may answer that.

A. In answer to your question, I did not review the file for that specific purpose, because there is nothing in the subpoena that asked me to do that. The subpoena called for me to produce all of the F. B. I. records dealing with this particular investigation, and I received the subpoena at one o'clock, and didn't have the opportunity to review the files.

Q. I realize you had very little time, and therefore the answer to my question is that you didn't have the opportunity to do so.

A. That is correct.

Mr. Duggan:

I will withdraw my objection, your Honor.

The Court:

Your objection has been ruled on, Mr. Duggan.

Q. Mr. Hallford, you don't have to answer this question except on the advice of counsel. Will you examine—

The Court:

I might say upon advice of the Court. The Court

is the one here to tell this witness whether he answers the question, not his counsel.

[179] *Mr. Pomeroy:*

You are quite right, your Honor. I agree.

The Court:

I think Mr. Hallford understands that. He may state his objection.

Mr. Pomeroy:

The only reason for my comment was because Mr. Anderson had been good enough to speak to me before the hearing this afternoon.

The Court:

Let's not be in error as to who makes the rulings here.

Mr. Pomeroy:

I realize that Mr. Hallford may have a difficult position.

Q. Will you examine your file with a view to ascertaining the circumstances concerning the mailing of the notice. Plaintiff's Exhibit 10?

A. Well, I can answer that question in two ways. I don't have any objections to the examination of the file. But the whole point is in the production of the records and the result of such examination, per departmental order No. 3229.

By the Court:

Q. Now Mr. Hallford, as a matter of fact, had you seen prior to the time it was handed to you that exhibit?

A. No, sir.

Q. You hadn't seen it?

A. No, sir. It was handed to me on the stand. I hadn't seen [180] this.

The Court:

It is obvious that he hasn't had time to prepare himself for this sort of examination, intelligently. The suggestion of the Court is, now that he has seen the exhibit, that he examine his files and see if there is any reference to it in the F. B. I. records, and then take the matter up from there. If there is anything relevant at that time, we will hear it.

Mr. Pomeroy:

That is agreeable.

The Court:

I say frankly I don't think he is bound to bring in all his records of the F. B. I. relative to this case. Your only inquiry is directed to this particular exhibit.

Mr. Pomeroy:

At this time, that is correct.

The Court:

And the records of the F. B. I. as to where it went.

Mr. Pomeroy:

That is the purpose of this particular inquiry.

The Court:

Whether the records show it was sent.

Mr. Pomeroy:

That is correct.

The Court:

Mr. Hallford, I think in view of that subpoena, we will leave it that you examine the records according-

ly and report tomorrow with reference to that matter. We will suspend this interrogation for the time being.

[181] *Mr. Pomeroy:*

Thank you, sir. That is perfectly agreeable. Thank you very much.

Mr. Duggan:

I would say this, your Honor, so that you will understand our position. We have no desire, of course, to pry into the private records of the F. B. I., but if it is a matter pertaining to the actual notice sent to either Mr. Parnell or the First National Bank in Indiana, we would like to see that part of the record, because that is the best evidence.

The Court:

You are telling me that?

Mr. Duggan:

I am just telling your Honor my position.

The Court:

You are not saying that you are not going to have any objection to it, if he should find such a record?

Mr. Duggan:

That is right. In other words, his testimony would be secondary evidence, and we would like to see that particular part of it. We have no desire to pry into the—

The Court:

I think we will suggest to Mr. Anderson, if Mr. Hallford finds any record among his records relative to this exhibit, as to whom or when it was sent, that he bring that into court.

Mr. Duggan:

That is right.

The Court:

Then we will rule upon the question as to whether it shall be presented.

[182] *Mr. Anderson:*

Yes, sir.

The Court:

We will honor the subpoena to that extent. The whole subpoena is too broad.

Mr. Anderson:

Then may we be heard relative to its admission?

The Court:

Then you will be heard. Bring into court any record relative to this exhibit, and we will hear you further tomorrow.

Mr. Pomeroy:

Thank you, Mr. Hallford.

I take it there is no cross examination desired at this time.

Mr. Duggan:

No.

Mr. Kirkpatrick:

Subject to the additional testimony, if any, which may be supplied by the witness who just left the stand, your Honor, the plaintiff rests.

Mr. Harrison:

If the Court please, if plaintiff rests—

Mr. Kirkpatrick:

Your Honor, there is one other offer which I would like to make, if I may withdraw that statement, and I think out of fairness to other counsel I should offer it at side bar.

(At side bar.)

Mr. Kirkpatrick:

If your Honor please, plaintiff offers in evidence at this time the indictment in the [183] matter of United States of America against Arthur Anthony Rocco, alias Arthur Lewis, No. E-5016 Criminal, United States District Court for the Western District of Pennsylvania, and the verdict of the jury thereon, entered on December 5, 1950, on certain of the counts included in the indictment, those counts involving, among other things, some of the bonds involved in this litigation.

Mr. Duggan:

For what purpose, Mr. Kirkpatrick?

Mr. Kirkpatrick:

They are offered for the purpose of establishing that the defendant Rocco knew that the bonds were stolen.

Mr. Duggan:

On the part of the defendant—

The Court:

Wait a minute. I think I might as well excuse the jury until tomorrow morning. I assume there may be a motion or two.

If you will just sit down. I will excuse the jury and we will take it up.

(In open court.)

The Court:

Members of the jury, you have heard the statement of Mr. Kirkpatrick. Except for the possibility of Mr. Hallford being brought back to the stand, he is going to rest his case.

Now, there has been a proposition presented to the Court that should be discussed not in the presence of the jury, and it being now ten minutes to three this afternoon, [184] I am going to excuse the jury until tomorrow morning at ten o'clock. We will recess a little early today.

Of course, some people are celebrating and this is a holiday anyway, so I will give you an hour and ten minutes off from your usual labors this afternoon.

Let me again remind you of all the instructions of the Court, particularly about discussing the case, maintaining an open mind, and not permitting any one to talk to you about the case.

The jury now is excused until ten o'clock tomorrow morning.

Then the Court will take a ten minute recess.

(A recess was taken at this time.)

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[185] (In absence of jury.)

Mr. Casey:

The defendant Rocco objects to the offer as made by the counsel for the plaintiff, for the reason it is not *res judicata* between the parties. The parties are different, the burdens of proof are different, the issues to be tried are different, and it has no probative value general. This is one exhibit you only offered against me again?

Mr. Kirkpatrick:

I did.

The Court:

You offered it only as to defendant Rocco?

Mr. Kirkpatrick:

Your Honor, I offered it only against the defendant Rocco.

The Court:

State again the purpose of it.

Mr. Kirkpatrick:

The purpose of it at this time is to show knowledge on the part of the defendant Rocco that the bonds were stolen. The indictment—

The Court:

I think you have to be specific, Mr. Kirkpatrick, as to what you are going to offer, as far as that record is concerned.

Mr. Kirkpatrick:

Yes. What I am proposing to offer, your Honor, is the indictment and the verdict of the jury. I say frankly to the Court I don't know—

The Court:

Don't you offer the judgment of the court, at least as part of it?

Mr. Kirkpatrick:

Yes. Well, the judgment of the [186] court I take it is the sentence in a case such as this. And I would offer also the sentence that was imposed on the verdict. I have obtained from the files of the clerk

papers consisting of the indictment, the verdict and the sentence.

Mr. Duggan:

What does the indictment charge, Mr. Kirkpatrick?

Mr. Kirkpatrick:

Well, the indictment, as I recall it, Mr. Duggan—I think it contained thirty counts—

Mr. Duggan:

Well, you have it there, haven't you?

Mr. Kirkpatrick:

Yes.

Mr. Duggan:

Well, quote from it, so there won't be any mistake about it.

Mr. Kirkpatrick:

Well, let me find the particular count—

Mr. Miller, Jr.:

I wonder if, while he is hunting for that, I can have the offer read again, to know against whom it is offered. I didn't hear him.

The Court:

It isn't offered against you anyway.

Mr. Miller, Jr.:

Thank you.

The Court:

As I understand it, it is just offered against the defendant Rocco.

Mr. Miller, Jr.:

Well, I have some doubt in my mind anyhow, and I may make some objection to its admissibility, your Honor.

[187] *Mr. Kirkpatrick:*

The twenty-second count of the indictment, your Honor,—and that was one of the counts upon which a verdict of guilty was returned, and upon which the defendant was sentenced—reads this way:

> "The Grand Jury further charges that on or about the 28th day of September, 1948, at Indiana, County of Indiana, in the Western District of Pennsylvania, the defendant Arthur Anthony Rocco, alias Arthur Lewis, did knowingly transport in interstate commerce from New York City, New York, to Indiana aforesaid certain securities of a total par value of $19,600, to-wit, forty-three Home Owners Loan Corporation 3% Bonds of the United States of America, Series A, further described as follows"—

And then follows a description of the bonds, which, if agreeable, I will let the—

The Court:

Those are the numbers of the bonds in the first group?

Mr. Kirkpatrick:

Those are the numbers of the bonds involved in the first group; that's correct, sir. And after the listing of the numbers:

"the property of the Bank of America, Los Angeles, California, theretofore stolen, converted or taken by fraud."

Now, the twenty-third count of the indictment, upon which a verdict was also returned and sentence imposed, reads this way:

"The Grand Jury further charges on or about the 28th day of September, 1948, [188] at Indiana, County of Indiana, in the Western District of Pennsylvania, the defendant Arthur Anthony Rocco, alias Arthus Lewis, did receive, sell or dispose of certain securities of a total par value of $19,600, to-wit, forty-three Home Owners Loan Corporation 3% Bonds of the United States of America, Series A, further described as follows:"—

And again follows the listing of the bonds involved in paragraph 7 of the complaint. And then these words:

"the property of the Bank of America, Los Angeles, California, which said securities were moving, were a part of and constituted interstate commerce from New York City, New York, to Indiana aforesaid, the defendant knowing said securities to have been stolen, unlawfully converted or taken."

The Court:

And both those counts allege that he knew they were stolen?

Mr. Kirkpatrick:

Yes. My understanding is that it is an integral part of the offense, and the last allegation is "the

defendant knowing said securities to have been stolen, unlawfully converted or taken," and I understand that there is no controversy that that is an element of the offense.

Mr. Duggan:

That is right, as far as that is concerned.

Mr. Casey:

If the Court please, the indictment, first, is just notice to the defendant of the charge against him and the *prima facie* case as found by the grand jury. The United States of America is the moving party. Someone in- [189] stituted the proceedings, and they found their way into the grand jury, of which it was not the plaintiff in this suit. Therefore between the criminal case and the civil case the parties are different. The indictment has no probative value except to prejudice the defendant--

The Court:

Well, I understand he follows that by the verdict and the judgment.

Mr. Casey:

Oh, yes. That—

The Court:

I understand he proposes to follow the indictment.

Mr. Kirkpatrick:

With the verdict and the judgment.

The Court:

The verdict of guilty plus the sentence.

Mr. Casey:

The only way that this could be introduced is to attack the credibility of being a crime in the nature of *crimen falsi*, if Rocco would take the witness stand, to affect his credibility. The issues are not the same—

The Court:

There are a couple of Circuit Court decisions against that.

Mr. Casey:

Well, it is heretofore in the civil action, where the parties are different—

The Court:

I know that is the familiar rule. But one party here has indicated, "Where a party to a civil case has previously been convicted in a criminal case of a crime relating to the same factual situation which is an issue in [190] the civil case it has sometimes been held that the record of his conviction is admissible against him on the ground of estoppel." Now, as I understand, this proposition is to simply show that he had knowlege.

Mr. Casey:

Your Honor, I understand that.

The Court:

And if I understand the evidence of the plaintiff, what he purports—what he thinks he has shown in this case, and if he shows—if we assume for the purpose of discussion he has shown the theft of the bonds, he shows an infirmity in the title of these

bonds, and tries to bring home then to the defendants the burden of going forward, explaining the possession of those bonds in their hands, the issue would then be, was it an innocent possession on their part of bearer securities or whether it was some guilty possession, or some possession involving the question of knowledge on their part as to where they were obtained and how they got them. I am frank to say we have been working on this proposition, because I inquired of counsel at pretrial whether he was going to use it, and he said he was, and I have given it some consideration. It seems to me, based on the authority of two cases, this is admissible against Rocco for a limited purpose.

Mr. Kirkpatrick:

As to Rocco only.

Mr. Casey:

Well now, if it is only offered--it is offered against Rocco and for a limited purpose, I take
[191] it, Mr. Kirkpatrick, that it is offered purely for the basis to show guilty knowledge.

Mr. Kirkpatrick:

That's right.

The Court:

And I don't think it would go much beyond that. I am frank to say, that it is conclusive on his part that he did anything else.

Mr. Kirkpatrick:

I frankly, your Honor—I didn't find the cases to which you refer.

The Court:

Well, the clerk got them.

Mr. Kirkpatrick:

I talked with Mr. Casey, he just--the clerk is a better lawyer than I am. I don't want to lead the Court in error—

The Court:

Well, I am going to leave it up to him. I mean, if you see the argument, and it is a matter if that is the rule--

Mr. Kirkpatrick:

That is correct.

The Court:

—if you want to take your chances on it.

Mr. Kirkpatrick:

That is correct. And I wanted to see what objection Mr. Casey interposed to the thing. And I want to say very frankly to the Court the last thing I want to do is to induce error here, and try this case again.

The Court:

I won't worry about that.

Mr. Casey:

Now, in line with that—it is quarter after three—I would ask your Honor not to rule on it as far as my—

[192] *The Court:*

Well, that is what I am going to do. You have brought this up for discussion, and I want to call your attention to two cases—

Mr. Duggan:

What are those, your Honor? I was out, I didn't get those.

The Court:

I was just about to read them, Mr. Duggan. The case of *Austin v. United States*, in 125 Fed. Second, page 816. And that cites a number of other cases. The other cases cited in there—it cites among others *Diamond v. New York Life*, 50 Federal Second 884. Now, I had in mind I would like to have counsel see in the morning—we can postpone this matter. But as I understand the theory of the case, that these particular counts on which he was convicted, the judgment of the court, not necessarily beginning the term of the sentence, but there was a sentence —for that limited purpose. I have in mind under those cases that that part is admissible. Now, if there are cases to the contrary, I would like to see them.

Mr. Casey:

Well, it would appear at first blush that as far as the ordinary rules of *res judicata* on a material question, the parties are not the same, and the burdens of proof are not the same—

The Court:

Well, I would instruct the jury there, Mr. Casey, for instance, that on many matters that wasn't conclusive on his part as to what the transaction was. But [193] it is some evidence. It is evidence on the part of the plaintiff of some knowledge brought home to him. That is the extent of it.

Mr. Casey:

Well, the unfairness of a ruling such as that is that—in the evidence in the case, had it not been for this indictment containing many—$179,000 worth of bonds, Arthur Rocco would never stand convicted in this case or anything else, because the theory of the Government was that it wasn't an accident the first time. They don't prove one iota that he was ever in New York State, that the bonds were ever in New York State, as laid by the indictment. But when you take $56,600 worth of H. O. L. C. bonds and $40,000 worth of West Penn Power Company bonds, and certain other Treasury bonds, the theory of the Government is that the first time it might have been a mistake, but the second and the third and so forth, so that the jury is without any substantial evidence on it. So that is why I say to pick out an isolated part here of an indictment and a judgment of conviction thereon certainly is against the spirit of a fair and impartial trial as far as this man is concerned. And all that it does then—

The Court:

Well, that is a judgment. It simply estops him from denying the fact that those bonds were the particular ones that disappeared or were stolen.

Mr. Kirkpatrick:

And that he knew they were stolen.

[194] *The Court:*

That is all it amounts to.

Mr. Casey:

I understand that.

The Court:

But you look at that. We will discuss that further in the morning. You look at that.

Mr. Kirkpatrick:

Your Honor, to complete the offer, I might also say that counts twenty-eight and twenty-nine, upon which a verdict of guilty was also returned, are the identical bonds referred to in paragraph 11 of the complaint.

Mr. Casey:

We don't dispute that. The numbers are the same there.

Mr. Duggan:

Now, may it please your Honor, I take it the meat of this entire action, so far as it affects Mr. Parnell and the bank—and I am not speaking for the bank, I am not authorized to, but I think our positions are almost identical, may be somewhat a little different —is the same. There has been introduced here a record which your Honor sat me down on this morning, some Treasury regulations, and I referred to Treasury Regulation—or whatever it may be termed —300, which provides that these things must be paid on presentment. That was referred to by Mr. Kirkpatrick when he made his offer. And I think it really controls this situation. I believe that unquestionably in this particular case the Federal law prevails rather than the State law, because they are Federal obligations. I think—I don't think there can be any question about that. And the Treasury [195] regulations have the force and effect of law.

Now, they say that they must be paid on presentment. Now, I am going to concede this, that if those bonds were presented, and a defendant here such as Mr. Parnell or the Bank of Indiana had actual knowledge of the fact that they had been stolen, or they were in possession of sufficient information to justify them in believing that they had been stolen, then there might be some ground for this action as against them. But there isn't a scintilla of evidence —the burden is on the plaintiff to prove its case, and there isn't a scintilla of evidence to show that they had actual knowledge. That is out.

The Court:

What do you regard the plaintiff as having shown so far?

Mr. Duggan:

I regard the plaintiff as having simply shown that the bonds were presented and cashed through the First National Bank in Indiana, and the proceeds turned over to Mr. Parnell, and then by Mr. Parnell turned over to Mr. Rocco, and that is all. That is all that has been shown in this case.

Now then, what is there, what circumstance, what incident is there in this case, that is in the evidence, to show that Mr. Parnell or the First National Bank in Indiana had any reason to believe that these bonds were not properly the property of Mr. Rocco? He takes them in—he comes in [196] there and he says, "I would like to have these cashed." Mr. Parnell goes down to the bank, your Honor—he is a reputable attorney, he is a very outstanding citizen up there—

The Court:

That hasn't been shown on the record yet.

Mr. Duggan:

No; but it hasn't been shown against him either, and you are going to presume he is. And he is a member of the bar, and that has been shown. And he takes them down—

The Court:

Well, my inquiry, Mr. Duggan, was addressed to this proposition of the burden of proof.

Mr. Duggan:

Yes, sir. The burden of proof is on the—you are right, your Honor. And the burden of proof is on the plaintiff here.

The Court:

I just wanted to get your idea, where you think it is.

Mr. Duggan:

And I take the position that they haven't shown sufficient to put the defendants here on their defense. In other words, if they could show something—I would like you to scan this record and point out to me any circumstance that would put Mr. Parnell, as an attorney, or the officers of the First National Bank in Indiana on notice that these bonds had been stolen or were not—there is no evidence, of course, that they have been stolen. If there is any evidence—if there is any inference to be drawn from the [197] testimony here so far, you have got to find that somebody in that bank stole the bonds, because they were back on a shelf, far

beyond the reach of any individual, and if they were stolen at that time, why, somebody on the inside stole them. There is no question about that, as far as the record is concerned. But we have got to go on the record. And there are two theories on which the Court could permit this case to go to the jury. The first one is that there are circumstances shown that would put an ordinary person on inquiry. Now, I ask you what single, solitary circumstance has been produced in this evidence that would put anyone on inquiry. Now then, secondly, what evidence is there of any actual notice? Under the Treasury regulations, which control this thing—that is the reason I was dwelling so much on Treasury Circular 300—

The Court:

Well, you said you didn't know what they were. Now, don't tell me you know what they are.

Mr. Duggan:

Well, listen, I know generally what they are. They say that they have got to be paid—they say that they have got to be paid on presentment. And I say—and I have handed your Honor some law heretofore that indicates that the law of this case is governed by Federal decisions rather than by State decisions. And they hold that these Government securities must be paid on presentment. And unless there is something—now, I just would like for [198] Mr. Kirkpatrick or my friend Mr. Pomeroy to point out to your Honor any single, solitary circumstance now that would put them in possession at the time they made this transaction of—anything

that would put them on notice. It is easy enough now, your Honor, for you and myself and all the people here in the courtroom to know that these bonds were evidently—that they were originally mislaid and may have been stolen. But that happened back in 1951. They have got to be charged with notice as of the date that the transaction occurred, which was in September and October of 1948. Everybody knows now that Mr. Rocco was convicted in 1951 in connection with the transportation of these bonds. But in 1948 nobody knew about it. Judge Gourley—we had a—

Mr. Kirkpatrick:

If your Honor please, may I interrupt just to say there is no motion or anything presented. I don't know what we are doing.

Mr. Duggan:

No; but the Court wants our position. I say that you have got to consider this situation as it was in September and October of 1948. Judge Gourley, when we had a matter indirectly connected with this situation as it was in September and October of 1948. Judge Gourley, when we had a matter indirectly connected with this situation before him, wrote an opinion in which he discussed what he knew as sitting on the Circuit Court of Appeals in connection with the matter. That was after the entire matter had been exposed. And I think your Honor can well understand that these men, the bank and Mr. Parnell, had to be governed by the [199] situation as it appeared at that particular time.

The Court:

Mr. Duggan, assuming that there is no further evidence against Mr. Parnell, as I understand—is that correct, Mr. Kirkpatrick?

Mr. Kirkpatrick:

That we offer at this time, that is correct: not as a part of our case in chief.

The Court:

Assuming there is no further evidence against Mr. Parnell, as I understand it—it is a matter I deferred in relation to Mr. Rocco, and the matter of the F. B. I. relates solely to the Indiana bank—assuming that to be the fact, what is your motion?

Mr. Duggan:

My motion is for a directed verdict of—what do you call it?—involuntary dismissal with prejudice, or whatever it may be.

The Court:

All right. In other words, you want this case dismissed against your client?

Mr. Duggan:

Certainly, your Honor.

The Court:

We will take that under advisement for the time being. I want to hear from anybody else that has a motion. Do I understand there is another motion, Mr. Harrison?

Mr. Harrison:

At the proper time I would like to move that the Federal Reserve Bank of Cleveland—on behalf of

the Federal Reserve Bank of Cleveland, the plaintiff be nonsuited and the action be dismissed against the Federal Reserve Bank of Cleveland, for the reason that there is no [200] evidence that the Federal Reserve Bank of Cleveland converted the plaintiff's bonds. In support of that motion, I would like to present points. It seems to me that could be done with greater assurance if I were absolutely confident the plaintiff has closed his case. Staying open the way it is—

The Court:

Well, that is all right. You have made your motion. We won't go into it any further tonight, if you don't mind. I wanted to indicate to counsel, when I have heard you, as to what I think the status of this case is. I have some ideas about it. After all, tomorrow is tomorrow, and we have got to go ahead with something. Either that or stop. And if that is your position, when the case is closed—

Mr. Harrison:

I would like to reserve the right also, even though the Rocco indictment business was not offered against the Federal Reserve Bank of Cleveland, notwithstanding the fact that it was only offered against Rocco, I would like to reserve the right in the morning, if I so desire, to object to it.

The Court:

Very well.

Mr. Duggan:

Of course, we all want that.

Mr. Miller, Jr.:

Similarly, I also want to make a motion for involuntary dismissal with prejudice at such time as the evidence is closed on the plaintiff's part; and also [201] reserve the right as to the offer of the conviction of Rocco.

Mr. Duggan:

Your Honor, do I understand that the plaintiff has not yet actually rested? Is that the position, Mr. Kirkpatrick? I just assumed that you had. I didn't—

Mr. Kirkpatrick:

We rested, Mr. Duggan, subject to the securing of information pursuant to what investigation Mr. Hallford has made.

Mr. Duggan:

All right.

Mr. Kirkpatrick:

And subject to the introduction of the indictment, whatever the ruling of the Court may be on that.

The Court:

Now, gentlemen, we have had this case under consideration—I have ever since, especially the second pretrial, going over this, it was the first case to try, and what I considered to be at least a fair effort to search out the law on this subject. And it seems to me, assuming now for the purposes of this discussion—and that is all this is, discussion—that if the jury believes that the plaintiff had certain evidence here before this jury, and on the assumption

that you rest in the morning, it seems to me that it has shown this proposition, that is, for the jury: That you have got a series of bearer bonds that passed by delivery. There is no showing—the showing by [202] the plaintiff is that no one is a holder in due course for value. On the contrary, none of the banks are in that position, none of the individuals are in that position. On the face of the bonds the admissions by the bank and by Parnell are at the most they were conduits to whom this money—or the bonds passed for collection or for redemption. Now, I take it that my understanding of the law—and that is why I mention it tonight, so you will know the Court's position, know how I intend to rule—that three defendants are in the position then of those who under the law have an instrument in their hands at one time or another in which there is an infirmity or defect in the title. And that proposition is ruled by the—I don't think the State cases and the Federal cases are any different—the case is ruled by two cases in Pennsylvania. One is the—the case in the Federal Court is *Queenan v. Mays*, 90 Federal Second 525. But the case more apropos of our proposition is *First National Bank v. Goldberg*, 340 Pa. 337, in which Justice Stern wrote the opinion, and where lawyers were involved and banks in almost the same set of circumstances, that the plaintiff here then has shown title that he lost and, if you believe his evidence, that was stolen, therefore it is a defective title and it is up to the defendants to explain their possession and their handling of these bonds. In other words, it is a question [203] of whether there was bad faith. As Justice

Stern said, simply a question of bad faith, and all these other matters go to the question of bad faith, notices go to the question of bad faith.

That is the position of the Court as to the three defendants.

Now, as to the Cleveland bank, that is an entirely different proposition. It just seems to me that you are mighty weak so far as the Federal Reserve Bank of Cleveland is concerned, because it has been conceded that they are a fiscal agent of the United States. Therefore you show no indication whatsoever of any duty on their part except to redeem the bonds and pay the money. And if they are a fiscal agent, they are different from the Bank of Indiana. In other words, banks should be in the same position. Unless something is brought home to the Federal Reserve Bank of Cleveland, I don't see how they can stay in the case. That is my present view. Now, what do you have to say about that?

Mr. Kirkpatrick:

Well, as to the first part, your Honor, I agree whole-heartedly.

The Court:

Except as to the part you disagree.

Mr. Kirkpatrick:

No, I am not sure that I do. As I indicated, at least I agree to the extent that my case is weaker against the Federal Reserve. And I suppose I am [204] indebted somewhat to my friend Mr. Duggan over here. He was the one that mentioned this case of Ritchey, to which I referred this morning, and

got me over some of my difficulties, because it seems to me that that case is a square ruling by the Supreme Court. And it is the only way I can read it, even from the facts and what the court said, that once you prove actual notice in the hands of a person he is bound by it unless he can explain it. Now, I have no doubt Mr. Harrison intends to offer proof that they didn't know about this notice at the time the bonds were paid. And if he does that, then I think we have got a question of credibility of the witnesses for the jury, and that will bring in, for example, possibly the deposition we were talking about earlier.

But here is a case in which the United States Supreme Court now is asked to adopt a rule which it was being urged was in effect in some States, that once you prove notice, that you can never get out of it. Now, the court said "that isn't so, the State courts of Illinois have not so held, and we don't believe it is good law. But we think the Michigan law is good law, and that is that once there has been proof of notice"—and there is no question about that in this case as to the Federal Reserve Bank—

The Court:

You are talking about a fiscal agent now, are you?

[205] *Mr. Kirkpatrick:*

Yes, I am talking about—

The Court:

A fiscal agent of the United States?

Mr. Kirkpatrick:

Yes, I think that same thing would be true. Other-

wise, your Honor, you get to this proposition—and I am not sure that Mr. Harrison and I agreed on it. Let us assume in this case for a minute that the Federal Reserve Bank's testimony will show, plus mine, yes, that they had actual knowledge at the time that these bonds were presented that the person presenting them wasn't the rightful owner. Now, it seems to me that in that case the Federal Reserve Bank is liable—

The Court:

The trouble with that theory, Mr. Kirkpatrick, is that you have shown in your case other banks, by the admissions from the Bank of Indiana, that they were sent for collection in the ordinary course of business between those two banks. Your own evidence establishes that.

Mr. Kirkpatrick:

That's correct.

The Court:

Plus—plus, I will grant you, notice going back some four years. And perhaps you have some further evidence.

Mr. Kirkpatrick:

Well, the depositions, your Honor, are interesting on that. And it becomes, as I see it, a question of credibility. It is going to be up to me to convince the jury that they paid, with knowledge or under such circumstances that their failure to inquire amounted [206] to bad faith. Now, I think I will have difficulty with that—

The Court:

Well, I think this—my present inclination is to go along with Mr. Harrison's contention that the Treasury regulations, and directives thereunder, statutes of the United States, relieve them of responsibility. That is the only one that is relieved in this case. Is that a fact?

Mr. Kirkpatrick:

To this extent, your Honor—one, in the first place, the Treasury regulations aren't yet before the Court; and secondly, assuming that—

The Court:

Well, I don't know about that. You put in that where they were referred to strongly.

Mr. Kirkpatrick:

Well, I don't know that that—but let's assume that they are before the Court. I don't know of anything in those regulations that say to the Federal Reserve Bank, "If you pay with actual knowledge that you are paying the wrong person, that you are relieved." Now, all the regulations say is that the Federal Government reserves the right to pay the bonds and to disregard caveats. Now, the Federal Reserve Bank under the statutes of the United States is a separate corporation—each bank is a separate corporation—and the Act expressly provides may sue and be sued, as any other corporation. And I think the question will therefore come down to one as to whether or not the jury is inclined to believe that they paid, as I [207] say, with actual notice or with knowledge of such circum-

stances that their failure to inquire amounted to bad faith.

Now, I don't know—perhaps the evidence, once it is in, won't be sufficient to support a verdict if it were returned. But I think the Federal Reserve still has the burden of saying what happened to the notice. And I therefore urge that they ought to stay in the case.

Mr. Duggan:

May I impose on your Honor for just a moment in connection with a suggestion that was made? The Court stated that neither Mr. Parnell nor the First National Bank in Indiana were holders in due course. That of course was true at the inception of this transaction. But the minute that the bank received the proceeds from these bonds and paid Mr. Parnell, without any resistance—and there isn't anything in this record—it became a holder in due course; and the minute Mr. Parnell paid Mr. Rocco he became a holder in due course. Now, I will be glad to give you a decision on that.

The Court:

I wish you would.

Mr. Duggan:

Yes, sir.

The Court:

—cover that situation, under the facts presented here.

Mr. Duggan:

Yes, sir.

Mr. Miller:

I just wanted to call the Court's attention this evening before we close, if I may, your [208] Honor, particularly to 113 U. S. 476, *Morgan et al. v. United States*—

The Court:

I am familiar with that case.

Mr. Miller, Jr.:

If you are familiar with that case, I wanted particularly to point—in that case, I think— it was before the Court of Claims, and it was a contest really between two private concerns. The United States was purely a stakeholder in that case. And in that case I think they particularly held that the burden was on the plaintiff to prove some lack of good faith and notice. And I think sustaining that also are the other two cases which are in a sense cited as companion cases—

The Court:

Well now, Mr. Miller, the difference between that situation and our situation, as I recall it, there is no showing there of any defect of title in the hands of either one of these parties. Knowledge of their handling and negotiating of those bonds, and so forth, and afterwards the development of—I forget whether they were stolen or what the defect was. But the plaintiff in your case—don't you agree that the plaintiff in this case has shown that your bank was not a holder in due course for value? In other words, you are a holder other than in due course, as an agent for somebody. In other words, you didn't buy those bonds for investment.

Mr. Miller, Jr.:

Oh, no. We were—undoubtedly it [209] was a situation of conduit, as described—

The Court:

In other words, you can't sit back and point, as far as you are concerned, whether you are an innocent holder in what was done there by the bank or whether is wasn't, under the burden of proof at this point.

Mr. Miller, Jr.:

Well, I think, if your Honor please, that is just the point that I make here now, is the fact that the only place that we find this shifting, alternating burden of proof is in the case that falls specifically under the negotiable instruments law as the holders in due course. And I think that the Federal rules, as they are pointed out here, are the ones that control where that is not the case.

The Court:

Well, just a minute. I will show you a case on it —I will show you a case on that. Oh, the Queenan case. The burden was on the bank to establish that it acquired title to the bonds for value without knowledge of any defect in officer's title or want of authority in him. That is *Queenan v. Mays,* 90 Federal Second.

Mr. Miller, Jr.:

Were those United States Government bonds, your Honor?

The Court:

Yes; Liberty bonds, bearer bonds.

Mr. Miller, Jr.:

They were bearer bonds?

The Court:

And they show a defect in the title. [210] That is, that they passed or were negotiated other than in due course for value. I understand that to be the rule, that if you had taken those as a real holder in due course for value, then —you could have sat back. But the point is there he has proven, we will say for the purpose of this discussion only, stolen bonds, and you don't hold them except for transfer purposes, or redemption purposes. So you must explain your position, determine whether you are innocent or not. That is my theory of this case, of the law of this case. If I am wrong, I am wrong all the way through. If you are correct, you are correct all the way through, I will grant you that.

Mr. Miller, Jr.:

Well, then our point is—and that is really our prime motive, I think that the essence—that the essential reason why these have been the holders. Under the cases—

The Court:

You can't be a holder in due course when you have taken them for collection, can you?

Mr. Miller, Jr.:

Well, the question—you get down to a very fine point of the law there, where we did actually give the money over again, and we have to stand on our rights.

The Court:

I think there is no dispute about the definition of a person who is a holder in due course for value. That person is protected on bearer bonds.

[211] *Mr. Miller, Jr.:*

I think he is the one—excuse me, your Honor.

The Court:

That is the person that is protected in this situation. The rest of you have to explain your possession. That is all it amounts to.

Mr. Miller, Jr.:

I think the holder in due course for value is the one who has to come forth and make his—raise his burden. That is what the negotiable instruments law says—although I don't think we are under the negotiable instruments law. We are under the regulations of the United States Government. And as such, under those regulations, we abide by them. It is the law of the United States that applies and enforces itself on United States Government.

The Court:

In what respect are you under it?

Mr. Miller, Jr.:

The bonds are issued by the authority of the United States Government, they are controlled by the directives and regulations of the Department of Treasury, in their essence. In other words, they—and I think there is a definite line of cases that they really remove themselves once more from the classification of bearer bonds issued by private corporations because of the fact—and the cases say over

and over again they are like money, they pass from hand to hand, like a five-dollar bill.

The Court:

Well, according to that, you are in a different position than Mr.—we will say Mr. Parnell is? [212] Is there a distinction in your two positions?

Mr. Miller, Jr.:

There might be some distinction, yes, your Honor, because it is a customary practice of banks to take these bonds in, particularly national banks I think would be subject to criticism if they refused their customers receiving Government securities for clearance. It has been stipulated, I think, that the bank is a national bank and a member of the Federal Reserve System. While we are not, I don't think, quite the same as the Federal Reserve Bank, obligated, we certainly would be subject to criticism if we did not. And these cases I think protect the rights of the Government to see that that passes absolutely freely. And I think that that is the essential purpose of it, of saying, "You banks can do this without any risk to yourself." And the Government has said, "We want you to be able to do this without any risk of having to come into court to answer for it, providing the people can't show that you were—that is, the party who contests it—can't show that you were a party to it." The essential differential is there in that these are United States Government bonds, bearer bonds, and are supposed to pass like money, the cases say over and over again. And the case which I cited, also 69 U. S. 110, and 88 U. S. 354.

The Court:

Those are cases Mr. Harrison cited, too.

Mr. Miller, Jr.:

That is correct. Mr. Harrison has [213] cited them, too. But they are both instances where the right of a private—or of a banking or similar institution is preserved to take these bonds without the requirement of later having to prove lack of notice. The burden—in each of those cases it says specifically that the burden is on the plaintiff to prove bad faith. And I think there is utterly no showing whatsoever, in so far as the bank is concerned, of bad faith in the matter. The essentials behind it are that banks are going to have to revise their whole method of operation, if they are going to have to prove these things. As a matter of public policy, if the banks get government securities in—oh, for escrow, for a hundred other different things, where they don't actually handle things other than this, if they take these things in, knowing that they are going to have to make investigations, and even then on investigation they may not feel secure in them, the case involves an important factor of public policy in so far as banking institutions are concerned. And I think particularly those three cases, which have been Sheppardized, and I don't find any recent cases on point either way in the matter. And I think probably that is because it has been accepted as a matter of course subsequent to that time.

Mr. Duggan:

Your Honor, I may say that my sole purpose here at the moment is in my own feeble but inimitable

way of [214] trying to prevent this Honorable Court from falling into grievous error. And in connection with the query suggested a moment ago as to the holders in due course, originally when Parnell got these bonds, of course he got them solely for the purpose of cashing, and he paid no consideration, and when the bank got them there was no consideration, and when they sold them there was no consideration. But the minute the bank paid Parnell it became a holder for value in due course, without any notice of any infirmity. When Parnell paid Rocco he also became a holder in due course without any notice. Now, you may find that in *McKinley v. Weinstein* in 74 Superior Court 482.

I want to reaffirm what I suggested just a few moments ago, though, that in my humble opinion this case is not ruled by the laws of the State of Pennsylvania, but by the Federal procedure. And in this record as of right now, at least by inference and by reference, Treasury Regulation 300 is before this Court. I don't have that here at the moment, but I think that a perusal of that regulation will in itself be sufficient to justify this Court in directing a verdict in favor of the plaintiff's involuntary—

The Court:

You see, apparently—I don't know whether you just don't understand the Court or not. But again I want to say to all of you, as I read the cases and the law on this case, it is simply, as Judge Gourley—it is the [215] same proposition that he had—he decided in his case, the case you referred to, to this extent—106 Federal Supp. at 302—that

anybody who relies on the law of the holder in due course for value must show a prior holder for value. Now, the plaintiff's evidence does not show any of the defendants to be holders in due course for value. The plaintiff's evidence is to the contrary. And the plaintiff's evidence shows that at least no one holds these bonds for value as the ordinary law merchant indicates in the old law of negotiable instruments, that has been built up and has been ruled upon for centuries or more. That is not this case. The plaintiff's evidence is, as I understand it, that the bonds disappeared over there and were brought in by Rocco through Parnell to the bank, to the Federal Reserve Bank for redemption. So no one holds these bonds for value. Everybody then in the case, as I see it, is bound to explain their position, whether it is innocent or not. If they do that to the satisfaction of the jury, they are out of the case. Now, the Federal Reserve Bank is in a little different position, because of these regulations. Now, that is my feeling on the case.

Mr. Duggan:

Do you think it is a question of fact for the determination of the jury rather than one of law for the Court?

The Court:

I think so. I think it is a question of [216] somebody coming forth and prove his case.

Mr. Duggan:

Even in the present state of the record?

The Court:

Yes, sir.

Mr. Kirkpatrick:

If your Honor please, I would like to hand up at this time a supplemental memorandum of law, and I would like to give counsel a copy, too. It is supplemental to the memorandum I previously furnished the Court on the very narrow point—and I don't wish to argue it at length—as to the effect of the fact that these bonds had been called before these transactions occurred. I called Mr. Harrison's attention to the only direct authority that I had been able to find, and referred to in the original memorandum, being a quotation from Britton. Then I went back through the current law school textbook on this subject of bills and notes, in which I find the only other direct authority, but it is explained very clearly there. And I am referring to this quotation from Professor Egler—and I know of no law to the contrary. It is down at the bottom of page 2:

> "An interesting question arises in connection with instruments payable at a fixed or determinable time, but with a provision for accelerated maturity. Clearly, if one purchases such paper after the fixed maturity he takes it too late to be a holder in due course in his own right."

Now, that isn't our case, because these hadn't arrived [217] at their fixed maturity.

> "If the maturity has been accelerated, and he knows that has happened, then equally clear, he takes too late."

Now, the evidence in here—the documentary evidence and in the pleadings—shows, it seems to me,

conclusively that these people took after maturity and after they knew it, because they all say they took for redemption. Now, you can't take something for redemption if you don't know that it has been redeemed.

The Court:

How does that put you in any better position than you are now, under the Federal rules?

Mr. Kirkpatrick:

No, I don't think, under your ruling, your Honor. As I say,—

The Court:

I don't see it helps you, because you are seeking now to apply the law of negotiable instruments.

Mr. Kirkpatrick:

That's right.

The Court:

All that does here—that period that you mention, all that does is transfer the burden and require them to explain their possession. And that is what I propose to rule.

Mr. Kirkpatrick:

Well, I think it has that effect.

The Court:

On different grounds.

Mr. Kirkpatrick:

It would prevent this from being a negotiable instrument, and would give them no defense.

The Court:

That is, in the sense in the negotiable [218] instru-

ment law being a holder in due course. I see Mr. Harrison over there doesn't agree with me on that.

Mr. Kirkpatrick:

Now, that brings the question—Mr. Harrison here is in a different situation. This doesn't apply to him at all.

Mr. Harrison:

I said a little while ago I would make a little more organized statement to support my motion in the morning. But to answer that simple question, our feeling is that it doesn't make any difference, as far as the Federal Reserve Bank of Cleveland is concerned, whether they were past due or in advance of maturity. The regulations exonerate us in either event. But we wanted the Court to be advised on the basis of the authorities, if necessary, that they were not overdue, and we cited the cases and three textbooks of corporate law. We think where counsel is mistaken is that his cases are those in which the holder has an option to accelerate maturity in case of a default in payment of interest or instalment of principal, but are not applicable where the right is reserved to accelerate maturity by the maker, which is here.

The Court:

Well, gentlemen, I think we will suspend until tomorrow morning. And at that time I take it the plaintiff will complete its proof; and then if you will present your motions we will rule on them.

[219] MORNING SESSION.

Wednesday, October 13, 1954
10:00 A. M.

Mr. Kirkpatrick:

If the Court please, during the session yesterday, the witness, Hallford, was interrogated and requested to obtain certain information. I understand that Mr. Anderson now has a stipulation with respect to what those files would show, which is agreeable to counsel for the defendants. Perhaps Mr. Anderson can state what that stipulation is.

The Court:

I understand all counsel have seen the stipulation?

Mr. Duggan:

Yes, your Honor. We have. And so far as the stipulation itself is concerned, we are satisfied to have it read into the record. As I say, we expect to show that the First National Bank in Indiana had no notice of—

The Court:

If there is no objection, the stipulation may be read.

Mr. Miller, Jr.:

If the Court please, that is not quite accurate. We will stipulate that if the witness were called, that is what he would testify to, but we reserve our rights to argue here at side bar the admissibility of that stipulation.

The Court:

Let's see the stipulation.

Mr. Anderson:

I have it written out in longhand, your Honor, and was going to read it. I can go back and [220] reduce it to writing.

The Court:

Come to side bar.

(At side bar.)

The Court:

As a general proposition, I don't like so many side bar conferences.

Mr. Anderson:

May I state at the outset, the reason we have requested a stipulation is that some of the documents refer to matters other than the matter here at issue, and matters which we would prefer not to bring into court.

The Court:

I don't think the F. B. I. records and witnesses are sacrosanct as to subpoena, myself.

Mr. Anderson:

We agree with the Court.

The Court:

But if everybody is agreeable to the stipulation, I have no objection.

Mr. Anderson:

Mr. Hallford, if called, would testify that the Exhibit No. 10, which was shown him yesterday, is

a photostat of a mimeographed circular, put out by the Pittsburgh office of the Federal Bureau of Investigation. This was done pursuant to request of the Los Angeles office of the F. B. I., by teletype, dated May third, 1944, at seven p. m.

The Court:

That is the teletype date?

Mr. Anderson:

Yes. To them. Subsequent to the mailing of the circular, the Pittsburgh office advised the Los Angeles office by letter, dated May 22, 1944, that the [221] circular had been mailed to all banks and security brokers in the Pittsburgh district.

There is no specific evidence in the file relating to the mailing to the First National Bank of Indiana, Pennsylvania.

The Court:

I understand you have all stipulated that that is what he would testify to if he were called.

Mr. Miller, Jr.:

We were just approached on it now. We will, to the extent that we reserve our right entirely as to the relevancy or competency of that evidence, if called.

The Court:

That part is all right. But it seems to me it is a question of a notice going out on ticker tape. That is all it amounts to. If you are a member of the Stock Exchange, you got a ticker tape notice, and that is all.

Mr. Miller, Jr.:

We didn't get it. The point is it is not evidence that we did get it.

The Court:

You say you didn't get it. But the evidence, as to its admissibility, I would have to admit. If that has been stipulated to, I will have to admit it, on the question of general notice. You can deny it or anything else.

Mr. Miller, Jr.:

If your Honor please, I think that the matter is entirely the contrary. That in order to show notice to anybody—he states here, specifically, that there is no record of it having been sent to the [222] First National Bank in Indiana, or that they were on a list. This is just boom, all banks and bankers, as if we found a circular on the street addressed to all lawyers.

The Court:

I was reading a case at 279 Pa., where a notice went out on a theft on the ticker tape, to all members of the New York Stock Exchange. That is notice. That goes in as read. You controvert it. That is proper—that you didn't get it or it didn't come to you. As far as the admissibility of the evidence is concerned, that is all right. If you won't agree to the stipulation, I can't force you.

Otherwise, then he can call the witness.

Mr. Pomeroy:

That is all I will do, of course, in that case, your Honor.

Mr. Miller, Jr.:

The point is further than that. This notice, just general notice to the bank, is not relevant in this case. The cases hold that the bank must have actual notice at the time of receipt, and until such time as they have notice of actual—

The Court:

As I understand this law, Mr. Miller, it is just a question of your bank exercising good faith.

Mr. Miller:

That is exactly right, your Honor.

The Court:

Nothing but that. All these questions of notice, the time of the notice, and so forth, if you didn't have it at the time it came, is four years too soon, [223] that goes to the question—

Mr. Miller, Jr.:

If your Honor please, I think they are entirely misleading the jury. They are nothing but remote implications. They are too remote.

The Court:

That is your argument to the jury.

Mr. Miller, Jr.:

I think that is the Court's prerogative to decide.

The Court:

What is the situation, then? Do you agree to the stipulation as such?

Mr. Miller, Jr.:

As such.

The Court:

That he would testify to that?

Mr. Miller, Jr.:

That that is what he would testify to.

The Court:

Do you have any other proof?

Mr. Pomeroy:

No, your Honor. There has been such a turnover in the F. B. I. office in Pittsburgh, as I am informed, that we can not get any clerical help that was here in 1944. This is the best evidence. It is a business entry from the file.

The Court:

Mrs. Palmer, I understand you have it on the record.

Mr. Miller, Jr.:

Will you note my objection?

The Court:

So that the Court has a correct understanding of it: I understand that all counsel stipulate that if Mr. Hallford were called to testify, that is what he would testify [224] to, as indicated in the stipulation.

Mr. Duggan:

That is what he would say. Anything Mr. Anderson suggests here, I would certainly go along with.

But, your Honor, I also wanted to call your attention to a case that I cited in my pretrial brief, that I gave you. I think it was the White-Phillips case.

The Court:

They don't say that this went to Parnell.

Mr. Duggan:

No, but in that case they had actual notice. They had this hung up on the wall, and they forgot about it.

The Court:

Gentlemen, I don't think you will ever agree with me probably—

Mr. Duggan:

Oh, I will, your Honor.

The Court:

On this question of notice. So there is no use of us talking.

Mr. Pomeroy:

Your Honor, shall Mr. Anderson read the stipulation, or shall I, or Mrs. Palmer?

The Court:

I think I will have the reporter read the stipulation.

(In open court.)

The Court:

Gentlemen, at this particular point, you may state your objection to the stipulation. I understand the stipulation presented to the reporter is what Mr. Hallford would testify to, in the event he was called on the stand. And that has been stipulated by all counsel. The jury [225] understands that.

As to whether or not it is admissible in this case, that is for the Court to rule upon.

The purpose of the stipulation is simply to take away the necessity of Mr. Hallford taking the stand any further in this case. It is perfectly proper.

The stipulation now has been offered, as I understand, on behalf of the plaintiff.

Mr. Pomeroy:

That is correct, sir.

The Court:

Now, you may state your objections to the stipulation, for the record.

Mr. Duggan:

We have, on behalf of Gilbert S. Parnell—

The Court:

In the first place—not to interrupt you—do I understand this is offered against all or one of the defendants, or against whom?

Mr. Pomeroy:

Your Honor, this is offered with respect to the defendant, First National Bank in Indiana, and the defendant, Federal Reserve Bank of Cleveland, specifically. And then I would say also as to the other two defendants in terms of the general notice that was given at the time.

Mr. Duggan:

I can't go along—I can't go that far with my good friend, Mr. Pomeroy.

The Court:

You make your objection.

Mr. Duggan:

The offer is objected to as stated by [226] counsel. We are satisfied that Mr. Hallford, if called, would testify substantially—

The Court:

We don't need to review that, Mr. Duggan. You have agreed that that is what he would say. That is the proof. The materiality of it, of course, is what you are objecting to.

Mr. Duggan:

We are objecting to it because there is no effort made, no indication that there was actual notice given to the First National Bank in Indiana, or the defendant, Gilbert S. Parnell.

Mr. Casey:

As far as the defendant, Rocco, is concerned, I am unwilling to stipulate in any degree as to the testimony of Mr. Hallford, and I ask that he be called to the stand.

The Court:

When I brought that up, I didn't hear any objection.

Mr. Casey:

Nobody bothered to show me the stipulation. Up to this point, I thought Mr. Pomeroy was going to offer it as to the two defendants, the Bank of Indiana and the Federal Reserve.

The Court:

I personally don't think it is admissible against Parnell or Rocco. That is the position of the Court. I think it is admissible against the bank.

Mr. Harrison:

On behalf of the Federal Reserve Bank of Cleveland, my objection is limited to, one, express notice, and the other that such notices are immaterial.

[227] *Mr. Miller, Jr.:*

May the Court please, I wonder if I might have one moment to confer with counsel, counsel for the bank from Indiana.

The Court:

Yes.

Mr. Pomeroy:

May I say I am sorry if we overlooked Mr. Casey in the stipulation?

Mr. Casey:

I couldn't see how it would affect me, that we got any notice.

The Court:

The ruling of the court as to that question, aside from that, the stipulation of itself indicates that it was not sent to any individual, and therefore it applies to the two banks in this case. That will be the ruling of the Court on it.

Mr. Miller, Jr.:

May the Court please, I wish to object to the admissibility of the stipulation on the grounds that it is incompetent, irrelevant and entirely immaterial. There has been no proper foundation laid for the purpose for which the stipulated testimony is shown.

I call the Court's particular attention to *Graham versus White-Phillips,* 296, U. S. 27, and I think that I might further add that such testimony is entirely misleading, and entirely too remote to be of any value or effect whatsoever.

I do, however, want to say that I have no question, insofar as the actual essentials of what is in that

stipulation, [228] so long as the stipulation is read in full, as was stated by Mr. Anderson.

The Court:

Mr. Miller, the objection is overruled. The Court will admit the stipulation, and the reporter will read it to the jury.

The objection of the Federal Reserve Bank is also overruled.

Mr. Duggan:

For Mr. Parnell, may I get my position on the record in connection with this statement?

The Court:

It is not admitted against you.

Mr. Duggan:

That is right. That is what I wanted to say.

The Court:

It is not admitted as to the two individual defendants.

The testimony, I think, will indicate whom it was sent to.

(The stipulation was read as follows:

"Mr. Hallford, if called, would testify that the Exhibit No. 10, which was shown him yesterday, is a photostat of a mimeographed circular, put out by the Pittsburgh office of the Federal Bureau of Investigation. This was done pursuant to request of the Los Angeles office of the F.B.I., by teletype, dated May third, 1944, at seven p. m. Subsequent to the mailing of [229] the circular, the Pittsburgh office advised the Los Angeles office by letter, dated May 22, 1944,

that the circular had been mailed to all banks and security brokers in the Pittsburgh district. "There is no specific evidence in the file relating to the mailing to the First National Bank of Indiana, Pennsylvania.")

Mr. Duggan:

Or to Gilbert S. Parnell. Could we include that, your Honor?

The Court:

Leave it just exactly as it is.

Mr. Pomeroy:

If the Court please, in view of the admission of the stipulation, we would like, at this time, to reoffer in evidence, Plaintiff's Exhibit 10, as to the defendants, who your Honor ruled are affected by the stipulation. That is to say, the two bank defendants.

Mr. Miller, Jr.:

We object to that offer on the same grounds we stated as to the stipulation.

Mr. Harrison:

The Federal Reserve Bank objects for the reasons previously stated.

The Court:

Objection overruled. The exhibit is admitted.

Mr. Pomeroy:

May we show it to the jury?

The Court:

Yes.

Mr. Pomeroy:

(To the jury.) This notice, which is [230] marked Exhibit 10, and which was shown to Mr. Hallford yesterday, and which is the subject matter of this stipulation which you have just heard read this morning, is the notice from the Pittsburgh office of the Federal Bureau of Investigation, dated May 20, 1944, addressed to all banks and security brokers, advising of the disappearance of these bonds and of the serial numbers and denominations of the bonds, $100,225 of bonds, which were taken from the Los Angeles office, May 2, 1944.

Mr. Kirkpatrick:

May it please the Court, also during the session yesterday, a question arose and I made an offer in connection with the judicial proceedings at E-5016. I think that matter, perhaps, can be disposed of very simply.

It is my understanding, but I would like the record to show, that each of the defendants has objected to the offer.

If they do object, I propose to withdraw the offer. I say that frankly to the Court. I am convinced that under the appropriate law, the proceedings are not admissible at the present time in this case.

In addition to the authorities which we discussed yesterday, there is—

The Court:

That being, Mr. Kirkpatrick, you are withdrawing your offer?

Mr. Kirkpatrick:

That is correct.

[231] *The Court:*

You tell the Court you don't think they are admissible; you shouldn't compel the other side to object. The position of the Court would be they are either admissible or not, and stick with it.

Mr. Kirkpatrick:

I do not want any comment made, your Honor. The only point as to why I am not offering it—if they are willing to have it go in, I would prefer that it be in the record, but I want the record clear so that there is no argument to the jury as to why I am not offering it.

The Court:

I don't think counsel will take advantage of any proposition that you offered and then withdraw, and was not in the record.

Mr. Kirkpatrick:

To have the record straight, may I renew the offer which I made yesterday—

The Court:

I may admit it. You may be in a position you don't want to be in. You can't play fast and loose with the Court, and then say if they object you are going to withdraw it. I don't permit that.

Mr. Kirkpatrick:

I will withdraw that.

The Court:

You should take a position with the Court, I think, that is consistent.

Mr. Kirkpatrick:

I will withdraw it then, for the present time.

The Court:

All right. You withdraw it. That may be done.

[232] *Mr. Kirkpatrick:*

I think, your Honor, those were the only two matters left open at the close of yesterday's session, so plaintiff then rests.

The Court:

Plaintiff rests.

Bank of America National Trust and Savings Association, Plaintiff, rests.

Mr. Anderson:

If the Court please, may I ask if the witness Hallford may be excused? He will be available if the Court or any counsel need him later on.

The Court:

I understand he is still going to be in the district. Is that right?

Mr. Anderson:

Yes.

The Court:

All right. We will excuse him. The plaintiff has rested. Are there any motions?

Counsel:

Yes, your Honor.

The Court:

There being motions at this time, I am going to ask the crier to take the jury to their quarters for the time being.

The jury understands that matters of law come up from time to time in these cases. These cases are civil cases. They are discussed not in the presence of the jury. That being the situation here now, I will excuse the jury until called by the Court.

The jury will retire.

[233] (The jury left the courtroom.)

The Court:

In view of the situation here, so that it is chronologically in order, I think perhaps, if there are motions, we will take them up in the order in which the defendants are named. Not that that means anything, except we will hear from them in that order, and then we will know just exactly where we are.

I will see whether Mr. Casey has any motion.

Mr. Rocco, Parnell, First National Bank of Indiana, Federal Reserve Bank. That is the order in which they are named.

Mr. Casey:

If the Court please, in behalf of defendant Rocco, I move for judgment of involuntary dismissal upon the basis that the plaintiff has not made out a case sufficient to be submitted to the jury.

The complaint filed alleges that on or about September 28, 1948, defendant, Arthur A. Rocco, converted to his own use forty-three Home Owners' Loan bonds, which are described in the complaint. Now at this stage—and I wish to point that out to the Court's attention—the fact that there is not alleged a concert of action here, that there is no conspiracy alleged, that this is a trover and conversion against Rocco alone, on or about September 28, 1948.

The record, as far as the defendant Rocco is concerned, does not show—the answer filed denies
[234] the first allegation which appears at Paragraph 7, that he did take and convert the property of the plaintiff.

Up to this point in the record, there is no evidence that Rocco had the bonds or converted them or did anything with them. I think that the plaintiff, having failed to make out a case, that we are entitled to judgment of involuntary dismissal.

The Court:

I don't think there is any question but what it is a separate and distinct issue as to each and every defendant.

What do you have to say as to Mr. Rocco, Mr. Kirkpatrick?

Mr. Kirkpatrick:

I want to check the record, your Honor, to make sure with respect to the rulings which were made on the pleadings yesterday. Your Honor will recall that when I offered in evidence the admissions in the various answers, I was permitted, without the objection of the defendants, in the first instances, to read the admissions without objection, and that led me to the conclusion that what I was reading was admissible as to all the defendants, they not having objected.

The Court:

You didn't offer them for that purpose. The pleadings, the answers, as I recall that matter, you offered each answer as an admission against that particular defendant making the answer.

[235] *Mr. Kirkpatrick:*

I will check the record, your Honor. Certainly, this is true, that when we got down to, I think it was the answer of the defendant Parnell, as Paragraph 12 in the record, there was objection made to that, and we got into the question as to whether or not the admissions in the answers of one were admissible against the other. And your Honor indicated that you thought it was admissible only to the party making the admission.

I think that on objection, that is so.

I do not know at this time, your Honor, that there is any evidence in the record, if I am wrong about the effect of the admissions in the other answers as to the defendant Rocco, that he actually handled the bonds.

Frankly, I say to your Honor, if that is the position to be taken by him, that that is a defense as to his client, I would ask your Honor, in the interests of justice, to permit me to reopen the case as to the defendant Rocco, and I will call him to the stand.

The Court:

All right. Let's hear from Mr. Parnell. See what the motion is as to Mr. Parnell.

I will hold a decision on that for a few moments, in the case.

We will hear from Mr. Parnell's counsel. Do you have a motion, Mr. Duggan?

Mr. Duggan:

Yes, your Honor.

[236] *The Court:*

I thought you might have a word or two to say.

Mr. Duggan:

Yes, your Honor. A few feeble remarks.

The plaintiff having rested, and it appearing that the evidence shows no actual notice on the part of Gilbert S. Parnell, and it further appearing that his participation in this transaction was clearly within the provisions of Treasury Regulation 300, which has been referred to if not even offered in evidence by the plaintiff, we respectfully suggest that as to him, a judgment of involuntary dismissal with prejudice be entered in favor of him and against the plaintiff in this case.

Now, we have heretofore, if your Honor please, submitted some pretrial memoranda in connection with this matter, and I don't want to take up the time of the Court by discussing that too much in detail. But I would like to call to your Honor's attention the proviso of Circular 300, which has been referred to by plaintiff in the presentation of its case.

Paragraph 79 of that circular is as follows:

"Coupon bonds or notes lost or stolen—The Treasury Department can grant no relief on account of lost or stolen coupon bonds or notes. United States bonds and notes in coupon form are payable to bearer, and title thereto passes by delivery, without indorsement, and without notice to the Treasury Department. Under generally recognized [237] principles of law an innocent purchaser for value without notice before maturity acquires good title to coupon bonds or notes even though reported lost or stolen, and no proof of ownership is required when coupon bonds or notes are presented in regular course

to the Treasury Department, or its designated agencies, for payment, exchange or conversion. The Treasury Department assumes no responsibility whatever with respect to coupon bonds or notes reported lost or stolen and enters no stoppages or caveats against their payment, exchange, or conversion. This is the long-established policy of the Treasury, and is in accordance with the following public announcement made by the Secretary of the Treasury on April 27, 1867, and reaffirmed and republished from time to time as to United States bonds and notes in coupon form reported lost or stolen:

'In consequence of the increasing trouble, wholly without practical benefit, arising from notices which are constantly received at the Department respecting the lost of coupon bonds, which are payable to bearer, and of Treasury notes issued and remaining in blank at the time of loss, it becomes necessary to give this public notice, that the Government can not protect, and will not undertake to protect, the owners of such bonds and notes against the consequences of their own fault or misfortune.

'Hereafter all bonds, notes, and coupons, payable to bearer, and Treasury notes issued and remaining in blank, will be paid to the party presenting them in pursuance of the regulations of the Department, in the course of regular business; and no attention will be paid to caveats which may be filed for the purpose of preventing such payment.

[238] 'The Treasury Department does not undertake to furnish any information with respect to the

presentation of coupon bonds or notes reported lost or stolen, but it will, wherever, possible, in order to assist in tracing lost or stolen securities, furnish, upon appropriate written inquiry, such information as may be available in the Department as to whether or not bonds or notes reported lost or stolen have already been presented, and, if already presented, as to the source from which they were received. United States coupon bonds and notes are customarily handled in the regular course of business without reference to serial number, and in most cases, therefore, it is improbable that any information will be available as to the source from which received.' "

Now, your Honor, I don't know whether the Court has ruled specifically on this proposition or not; but we take it, under the authorities that we have cited to your Honor, that the Federal laws control this situation. We say that our motion for an involuntary dismissal with prejudice should prevail, as to Gilbert S. Parnell, and, of course, naturally that refers to the bank, too, affects the bank, because there is no evidence of any actual notice ever having been submitted or sent to either of these people.

In other words, these bonds were just the same as bank notes, dollar bills, or whatever you may call them. They pass and there is never any question raised. And the [239] burden, of course, is on the plaintiff, to make out a *prima facie* case here. And we say that under the decisions and the treasury regulations that I have just suggested to your Honor, in the present state of the record, there isn't

any issue here that could go to the jury either as to Mr. Parnell or the First National Bank in Indiana, and I think that my motion at this time is good.

The Court:

Mr. Duggan, so far as that motion is concerned, I am going to overrule it. I am going to deny it. It is denied. I want to express the Court's position so that counsel again understands it, so that if this matter is reviewed, the Appellate Court understands why I am doing it.

The position, as I see it, is this: That the plaintiff has offered evidence, which if believed, would tend to prove that these securities were stolen out of the bank in Los Angeles. Plaintiff's evidence also shows defendant Parnell, the Bank of Indiana, took these bonds, not as holders in due course for value—

Mr. Duggan:

That is right.

The Court:

But as a conduit or as an agent for the purpose of passing them on to the Federal Reserve Bank of Cleveland for redemption. Therefore, under the law, as I understand it, plaintiff has presented its *prima facie* case, and it is up, and now the question is one of good [240] faith. They are bearer instruments, and whoever touched them after the *prima facie* case of being stolen has been shown, all they have to do to free themselves of any liability is to show good faith, and that is for the jury.

That is your position. Frankly, that is going to be the position of the—

Mr. Duggan:

I would say, your Honor, without wanting to prolong this argument, that under the state law—under the law—

The Court:

Under the United States law, too.

We can argue here until Doomsday, but that is the position the Court is taking. It is just a question of good faith.

Mr. Duggan:

That is the position of the Court. Furthermore, your Honor, I want to call the Court's attention to this situation.

The Court:

That is under the case you cited to me, as well as the case everybody else has cited.

Mr. Duggan:

I am coming back now, just for a minute, please—

The minute the First National Bank in Indiana credited the proceeds from the sale of those bonds to Mr. Parnell, it became a holder in due course for value.

The Court:

Of course, that is—

Mr. Duggan:

The minute Parnell paid Mr. Rocco, he [240-A] also became a holder in due course and there was no notice at that time.

The Court:

All right. We will hear the Bank of Indiana.

[241] *Mr. Miller, Jr.:*

If the Court please, I move for an involuntary dismissal with prejudice, on behalf of the First National Bank in Indiana, Pennsylvania.

In support of my motion, I state the following:

First, I wish to call the Court's particular attention to the fact that we stand in a different position, as a banking institution, and a separate position than private parties. The one thing the Court, I think, should keep in mind and I think it runs through all the cases is that what we have done here is the bank's business, and it being the bank's business—

The Court:

In what respect?

Mr. Miller:

In respect that this is a member bank of the Federal Reserve System, open for business,,and capable of handling and able to handle government securities. It was in this instance, as a matter of fact, located in a town where there was no member bank of the Federal Reserve System.

The Court:

Do you say you are a fiscal agent of the United States?

Mr. Miller:

No, your Honor, we don't, to this extent. We don't claim sovereignty. But we say as a member bank of the Federal Reserve System that we operate under the rules and regulations set forth by the Treasury Department, in the handling of government securities and [242] government bonds.

The relationship, to go into the accurate details of it, of which the Court I think could take judicial notice, of a member bank of the Federal Reserve System is that we own stock. The First National Bank in Indiana owns stock in the Federal Reserve System,—that is in the Federal Reserve Banks—and as such, therefore, is subject to the controls of the Federal Reserve Bank, to the extent that they handle and deal with relations in regard to the Federal Reserve Bank. There is a definite relationship there that must be maintained.

To go then into the cases, the cases have held that the burden is on the plaintiff, with reference to a banking house or to a securities house, to come forth and show bad faith in the case of handling United States government bearer securities.

The Court:

Which case do you have reference to?

Mr. Miller:

I have reference particularly to three cases, three United States Supreme Court cases. First, *Morgan et al. vs. United States.* That is the one I mentioned yesterday, where there were two private parties actually in litigation, even though the caption would appear to indicate it being the government. The government was actually a stakeholder in that case.

Also *Murray vs. Lardner,* in 1864—that is 69 U. S.
[243] 110, and *Hotchkiss vs. National Banks,* 88 U. S. 354. They are cases that are particularly and primarily in point, because they are pure and prime disputes between parties over United States Government bearer securities. The court in each instance had

said bluntly—we don't have to draw any similes or extenuating circumstances as to notes or anything else like that.

The Court:

The difference in your position and the position of the banks in the cases you cite is that those banks purchased the securities and you didn't, in this case.

Mr. Miller:

In one of those cases, I believe it was a situation of a conduit. But I think a purchaser of a security is even in a more tenuous position as far as the burden of proof than a mere conduit banking institution for banking purposes.

The Court:

Your position here is simply this, as I see it, Mr. Miller. It is a question now at this stage of proof in this case as to whether you have to go forward and explain anything or whether you can rest on the present state of the record.

Mr. Miller:

I think I understand it clearly.

The Court:

That is the crux of this case. That is what we are confronted with, the ruling that is to be made on that, the plaintiff having rested. I say very frankly,
[244] if you were a holder in due course for value, at this stage of the record, with the proof at hand, your position would be correct. I think you would be entitled to a dismissal. But I also say that under the authority of all these cases you have cited, and other cases, Pennsylvania law and the federal law, if this

proof is believed by the jury, going on that assumption, and you are not a holder for value, you just have to explain your position to the jury, as a matter of fact.

That is why I have to decline your motion and rule against you. At this point, all the ruling amounts to is that you have to go forward and show good faith.

Mr. Miller:

That is our particular point, that in day to day business, these bonds are as money. They are to pass as money. If I may quote from one of those decisions, the court comments at length—

The Court:

The matter is very simple that I have to decide. I have come to the conclusion—

Mr. Miller:

I would like to be heard most particularly because of that situation.

The Court:

That is the point on which the decision of the Court turns at this time.

Mr. Miller:

The difficulty is and the problem is, if the banks are going to be put on proving, in each case where they handle government securities or money—the
[245] courts have likened it to money—if they are going to be put on proof, more people are going to try, then, as a matter of policy, where they have bonds going through a bank—

The Court:

Don't worry about that. We are talking about stolen bonds.

Mr. Miller:

That is what I mean.

The Court:

When stolen bonds happen and you haven't purchased them for money or value, I think you have to explain it. That is the law of the United States and the law of Pennsylvania.

Mr. Miller:

I must differ.

The Court:

The case is right down to that simple proposition.

Mr. Miller:

That is where I take issue.

The Court:

That is where you and I disagree.

Mr. Miller:

That is where we disagree. Banks in their position handle these things. Stolen notices come through banks daily. The stacks would fill rooms in banks, if they had to check. Therefore, if people discovered that stolen government securities of any kind went through the bank, the bank is a financial institution, a good person to sue, they are financially responsible in the majority of cases, and if they go on proof, the bank then would be confronted with innumerable litigations.

[246] *The Court:*

We just apply the law. I apply the law as I find it.

Mr. Miller:

I think the law is clear in those cases.

The Court:

We understand each other and I am afraid I have to rule against you. Therefore the motion is denied.

Mr. Duggan:

May I make the further suggestion to your Honor —we have been talking about stolen bonds. There is nothing here to indicate—

The Court:

Wait, Mr. Duggan. You have had your time, if you don't mind.

When I mention stolen bonds, I say if the jury believes the testimony. I am not saying what they are.

Mr. Harrison:

As I stated yesterday, I have a motion to make at the conclusion of the plaintiff's case, but at the instant I am not certain whether the plaintiff has closed his case.

The Court:

If that is your position, I will take that matter up. I don't want to press anybody to make a motion until the case is closed.

I now have a motion, however. As I understand it, there is a motion before me that I permit the plaintiff to reopen his case.

Mr. Kirkpatrick:

That is correct.

[247] *The Court:*

We will hear you afterwards, then, after I rule.

Mr. Casey:

If the Court please, we are all, as the newspapers say, a battery of counsel in the court room; all experienced men. You are not sitting up there by chance. You are a legally constituted Court. Plaintiff has the burden of proof, and he has rested twice now. There is no showing of inadvertence or mistake, or any other reason. The plaintiff saw fit, on two occasions, to close his case; yesterday afternoon as early as three o'clock, and this morning, after recalling the witness, the F. B. I. witness.

Now certainly, in those circumstances, the same thing applies as to the offer of that indictment. You can't play for position here, to determine what you are going to do. You take a position. When you ask a witness a question, that you are going to be hurt by it, you can't play with it. If you get hurt, you get hurt.

Under a legally constituted Court here, in the interests of justice and the transaction of the Court's business, the plaintiff's attorney has seen fit to rest finally. I can't, then, point out deficiencies in the plaintiff's case, and he, at his whim can not, in the interests of justice, ask to reopen.

I respectfully submit that the motion of the plaintiff's attorney for permission to reopen the case and produce [248] additional testimony, would be prejudicial to the defendant, Arthur Rocco. I ask your

Honor to refuse the motion and rule upon the motion for judgment of involuntary dismissal.

The Court:

That matter is discretionary with the Court, and generally the reopening of a case is permitted, if there is substantial reason. If he has overlooked proof he should have in the case, to make out his proof and make his case complete, I think the Court should, in all fairness, and in justice, permit him to reopen. If he has anything that he can offer here that might—

Mr. Casey:

If I am to be penalized, then, for making this motion, the rules provide that at the end of the plaintiff's case, if there isn't sufficient evidence of an issue of fact—the plaintiff's attorney doesn't say—he says in the interests of justice, to wit—

The Court:

You are not penalized, in the sense that when he finishes, you still may make your motion.

Mr. Casey:

I submit to your Honor that what is the reason for a rule at the end. Should it be in my discretion, or should I play fast and loose then, and determine until such a point where I should wait?

When the person having the burden of proof—unless that burden shifts to me, hasn't made out a case under the law, I don't think it is a discretionary matter with the Court, unless there is some reason. if a witness is en route, [249] if a witness is being secreted, or if a witness has been overlooked—

The Court:

At this point, I want plaintiff's counsel to inform the Court what he proposes to do, if the Court reopens the case, so far as this defendant, Rocco, is concerned. See what proof he expects to show the Court and whether it is material.

Mr. Kirkpatrick:

As far as the defendant Rocco is concerned, your Honor, if the case is reopened, I expect to show by the witness at least that he had possession of the bonds and that he received part of the proceeds of the bonds. I do not wish to limit my examination to that extent, but I will show at least that.

I might also say, your Honor, as to whether or or not I played fast and loose with the Court. In the first pretrial of this case—and I am referring to page 33 of the transcript there—Mr. Casey speaking:

> "To turn his argument around, that is that the burden is on Rocco, he says in his brief, to show that, all he needs to show, which he can do, is that they came into Rocco's hands."

Now I submit, your Honor, that at no pretrial, at no time during this trial, did Mr. Casey at any time give any indication that he was questioning that these bonds came into Rocco's hands. And I say that he can't sit silent and then [250] take advantage of the failure of proof with respect to Rocco, and make an issue as to whether or not they came into his hands. I say he misled me, he misled the Court, if that was his position.

Mr. Casey:

I am amazed at such a line of argument. I don't have the burden of proof such as some of the other defendants here, where the burden shifts of showing good faith or some other argument. I am only called upon to admit—to face what comes from the mouths of the sworn testimony of these witnesses. I have denied it in my answer. It has never been raised. The question of whether this defendant would take the stand and plead his constitutional privilege, if called adversely, has been discussed at the pretrial. And the Court can take judicial notice that he is in Leavenworth prison. He issued a habeas corpus *ad testificandum* to get him here to testify. I don't mislead. I just sit there and try to keep out, which under the law I have a right to do, any reference under the proof as it is adduced in plaintiff's case, with reference to Mr. Rocco.

The Court:

I understand the trial tactics of the case here.

Mr. Casey:

As far as we have gone now, I think it would hinder justice if your Honor would allow an experienced counsel—

The Court:

It isn't unusual to permit a case to be [251] reopened to permit plaintiff to offer additional proof. That isn't unusual. You don't say it is, do you?

Mr. Casey:

No, for inadvertence, mistake, the hindering or hiding of witnesses.

The Court:

It is discretionary.

Mr. Casey:

There has to be something. Not an arbitrary discretion.

The Court:

The motion is granted.

Mr. Casey:

May I have an exception?

Mr. Miller, Jr.:

We would like to call for an offer. I believe counsel stated it, but I couldn't hear it at all.

Mr. Kirkpatrick:

I don't think, your Honor, I am required to make an offer. This witness, under Rule 43, is adverse.

The Court:

Here is the point. As I understood it, when you first made the request, you would only call Rocco for this purpose. Do you have any other testimony besides that of Rocco?

Mr. Kirkpatrick:

At this time, that would be the only purpose for which I would call Rocco.

The Court:

If I permit you to reopen your case, I think you ought to indicate to the Court what you propose to prove, what your proof is in this respect, right now, so we will rule on whether it is material.

Mr. Kirkpatrick:

I will call the witness Rocco, at [252] this time, your Honor, for the limited purpose of establishing that he handed the bonds to the defendant Parnell, and that he received a portion—

The Court:

Do you have any other proof—

Mr. Kirkpatrick:

Pardon me?

The Court:

Go ahead. I didn't mean to interrupt.

Mr. Kirkpatrick:

And that he received at least a portion of the proceeds from the disposition of the bonds, from the defendant Parnell.

The Court:

Do you propose to offer any other proof on this point, on your case against Rocco?

Mr. Kirkpatrick:

I think, your Honor, my disposition is to inquire of the witness Rocco at this time, although I would prefer to do it later, as to his whole transaction with the bonds.

The Court:

How do you call him?

Mr. Kirkpatrick:

How do I call him? Under 43, as a party for cross examination. Under Rule 43 of the Rules of Civil Procedure, which I take it gives me the right to im-

peach him or ask leading questions or cross examine him.

Mr. Casey:

May I interrupt? I would like the Court to take judicial notice that pursuant to your habeas corpus *ad testificandum,* Arthur Rocco is in court from the inception of this trial, or has been in the vicinity I also dislike to do this, but in view of [253] the circumstances in which counsel have placed me, I took counsel for the plaintiff to see the defendant, Arthur Rocco, yesterday afternoon. And he conversed with him, and Mr. Pomeroy, at length. And as a result of said conference, it was decided by Mr. Kirkpatrick, that he would call Arthur Rocco as a rebuttal witness.

Either that is what occurred and he closed his case—I am not asking your Honor—I've got to be protected on this record, so that I can get up here in good faith in front of this Court at the end of a man's case and say, "You have proved no case." I am entitled—he intended to call Rocco, he intended to call him as a rebuttal witness. So what can move your discretion?

The Court:

Did you have that agreement?

Mr. Kirkpatrick:

No—to this extent, your Honor, and I make it perfectly clear. Mr. Casey is correct. We talked about whether or not I could see the witness Rocco. I did see him yesterday afternoon, after Court, with Mr. Pomeroy, in Mr. Casey's presence.

I asked Mr. Casey yesterday, before we went up, "Do you intend to put the defendant Rocco on the stand?" He said, "I don't know." I asked him at the conclusion of our meeting last night, "Do you intend to put the defendant Rocco on the stand?" He said, "I don't know. I will decide that tomorrow morning."

[254] He asked me, "What is your indication? Are you going to call Rocco? And when?"

The Court:

This conversation took place after you talked to Rocco?

Mr. Kirkpatrick:

No, during our conversation with Rocco, I would say.

The Court:

Was the interview with Rocco predicated on whether or not you would call him as your witness in your case?

Mr. Kirkpatrick:

No, I didn't so understand it. I indicated to Mr. Casey that I wanted to talk with him before I did call him, but I at no time indicated that I would call him only subject to what he told me.

The Court:

Mr. Casey, you don't say that the interview was predicated on the proposition that the plaintiff wouldn't call Rocco?

Mr. Casey:

Only for rebuttal. No. That is at the end. After it was finished, it was determined that he—he talk-

ed to the witness for ten or fifteen minutes, and said, "I am going to call him for rebuttal." Then the question came up whether he was still going to be here that long, and I presumed that he was, unless he was released under the order of the Court.

I hesitated to bring it up, since your Honor had ruled. But I get to the point—we know about my position, [255] as far as a man serving a ten year sentence for the transportation and possession of stolen bonds, which are included among these, and so the question then arises as to what I shall do, as part of my case.

The Court:

Your position is proper. You are not being criticized. I think your position is proper. The point is, I am confronted with two positions.

Mr. Casey:

What I wanted to point out to your Honor, it was not inadvertence. It was trial strategy for some reason.

The Court:

As I understand it, he thought he had proved it through his pleadings, through some pleadings he had placed the bonds in Rocco's hands.

Mr. Casey:

Your Honor, my notes—I only have meager notes—

The Court:

That is a question of argument. If he thinks now he hasn't done it—

Mr. Casey:

My meager notes have it, that when Paragraph 12 of defendant Parnell's answer was ready to be read to the jury and offered in evidence, I objected to it, and your Honor ruled that it should be admitted as to Parnell alone, plainly and in open court, after objection on the record.

The Court:

That was the ruling of the Court, as I understood.

[256] *Mr. Kirkpatrick:*

That is my recollection of the record, your Honor.

Mr. Casey:

When I got sifting my notes, I couldn't see where there was any connection.

The Court:

I would have to agree with you. Now, the point is, if he hasn't put the bonds in his hands, and he wants to do it, all I have to decide is whether I am going to let him attempt it. And I am afraid I am duty bound, under the discretionary power of the Court, to permit him to reopen his case for that purpose. Therefore, I think I will rule that way. The ruling is that way, and we will proceed.

Mr. Casey:

That is why I hesitated to bring it up.

Since your Honor has ruled, under the situation, then, I took the plaintiff's counsel to see the defendant, so that he could talk to him. Then it was decided on his rebuttal testimony. It puts me at a tremendous disadvantage.

The Court:

No.

Mr. Casey:

He could have tried his case as he saw fit, and I have no objection to that.

The Court:

It is just a question of what the man is going to say. I assume—what he said at the interview—your interview was not predicated, as the Court understands it, on the idea that Mr. Kirkpatrick would not call him.

Mr. Casey:

That is right. When he left, he said [257] he was going to call him in rebuttal. When he talked to him, he talked in my presence.

The Court:

The ruling has been made. You have no other proof of that.

What I am getting at, I think in fairness to everyone, you must state your position now. If you are going to rely on that. If you don't know what you are going to be confronted with—

Mr. Kirkpatrick:

On this aspect, unless the man has changed his statement to me, there is no question but what he will testify that he had the bond.

The Court:

That will be the extent of your proof. That is what we are getting at. We want to know now whether you are going on for another two days or—

Mr. Kirkpatrick:

I suspect, your Honor—it is a question of order of proof. If Mr. Casey feels, in view of the circumstances, that he would prefer that I reopen and call him for that purpose—

Mr. Casey:

I am objecting--

Mr. Kirkpatrick:

I am willing to go ahead and examine him fully.

Mr. Casey:

I am objecting to your reopening the case, and I have to decide then, if you call Arthur Rocco, a convicted felon, whether to advise him to plead his privilege. And that is the next step we [258] will have to come to, here. We have known that from the inception of the case. You have known it, Mr. Kirkpatrick, Judge Willson has known it. All counsel have known it. And I have known it. There must have been some reason-- I don't think it was inadvertence why you didn't do this. So since the Court has ruled that you may reopen your case, I have objected to the reopening and excepted to his ruling on the basis that you have not shown any reason to move his discretion.

Mr. Kirkpatrick:

What I am saying Mr. Casey, is with respect to that, two things: One, in view of the unfortunate way in which the question arises, I am willing to do one of two things, whichever the Court feels is the fairer. I am willing, if the Court grants my motion to reopen, to examine the witness, Rocco, generally.

I am willing to examine him for the limited purpose, at this time, of showing that the bonds were in his possession.

If he is now going to assert privilege, and the Court were to sustain that as to any part, I would say frankly to you, that before closing again, I would call for the limited purpose of proving that the possession of the bonds was in Rocco, the witness, Parnell, who has already admitted it in his answer.

This was inadvertent, your Honor. I have no hesitation in saying that. It just never occurred to me in any of the [259] proceedings, that Mr. Casey was going to raise this question.

The Court:

I think in the pretrial record, there is no question about it, that it has never been denied or asserted that he didn't have the bonds. That is the reason the Court exercises the discretion. I mean, that has never been raised as a defense, that he didn't have the bonds. For that reason, I am permitting counsel to reopen his case.

Mr. Kirkpatrick:

May I say one thing more, in connection with the withdrawal this morning of the offer of the conviction? Mr. Becker and I spent quite a while last night, and I am convinced that the defendant Rocco, under Pennsylvania law—it isn't on that—Here is my point, your Honor, with respect to whether I was ploying fast and loose with the Court. I could have left it in with respect to the defendant Rocco, knowing very well no matter what the judgment was, he

wasn't going to appeal. But I didn't think it was fair to the Court, and I said to you frankly, I didn't think it was admissible on this state of the record.

Mr. Miller, Jr.:

I'm not sure I understand how much he is going to offer, and I think our interests and our rights on the re-opening come to the fore, and I think we should know exactly the limitations of how much he is going to offer in re-opening his case.

[260] *The Court:*

His offer is, I understand it, on the record, to show possession of the bonds in the first instance, and the receipt of proceeds. To that extent, I will permit him to proceed.

Mr. Miller, Jr.:

Only to that extent, as I understand it, your Honor.

The Court:

At this time.

Mr. Miller:

That is Mr. Casey's case, not ours.

Mr. Casey:

I understand the offer of reopening is that he will call Rocco as a hostile witness, or as a defendant, and then he will be limited to asking him, under his offer, did he have bonds, these numbered bonds in his possession, and did he receive some proceeds.

The Court:

That is right.

To that extent, the plaintiff may proceed.

Mr. Casey:

I understand that under that basis, if I waive the defendant Rocco's privilege, that I won't get in any further complications?

The Court:

If there is no question about that, Mr. Casey, the understanding is, I certainly will direct counsel, the witness is to abide by the understanding of counsel and the Court.

Mr. Kirkpatrick:

Pardon me. I didn't understand what the—

The Court:

I am permitting you to reopen the case to call the defendant Rocco for the purpose you have [261] stated.

Mr. Casey, as I understand it, has come forward with some sort of a suggestion, perhaps, that if Rocco testifies to that, he may be assured that he goes no further, I say certainly.

Mr. Kirkpatrick:

I am perfectly willing to agree, your Honor, that so far as this examination is concerned, I will not urge that what he tells me here is a waiver of his privilege.

The Court:

We are only ruling on the offer at this time.

We will take a ten minute recess.

(A recess was taken at this time.)

(The jury returned to the courtroom.)

(In open court.)

Mr. Kirkpatrick:

If the Court please, I desire to call to the stand at this time, for the limited purpose of showing that the bonds—

The Court:

That has been stated of record.

Members of the jury, I have permitted the plaintiff, at his request, on his own motion, to reopen the case for the purpose of calling additional witnesses.

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[262] ARTHUR ANTHONY ROCCO, the defendant, having been duly sworn, testified as follows:

Direct Examination:

By Mr. Kirkpatrick:

Q. You are Arthur Anthony Rocco?

A. Yes, sir.

Q. You are one of the defendants named in this case?

A. I am.

Q. Mr. Rocco, I ask you, did you on or about September 28, 1948, have in your possession the Home Owners' Loan Corporation bonds involved in this suit?

A. I did.

Q. And did you deliver them to the defendant, Parnell?

A. I did.

Q. And did you receive a portion of the proceeds of such bonds?

A. I did.

Mr. Kirkpatrick:

That is all, your Honor—pardon me.

Q. Did you also have in your possession the bonds involved in this suit, with respect to the bonds involved on or about October 28, 1948?

A. Well, to be honest with you, dates I don't remember. I kept no records. I have nothing to fall back on. I don't remember whether it was at that particular time or not.

Q. You recall the bonds, but not the specific dates?

[263] A. I know I had the bonds.

Q. Not the specific dates?

A. That's right.

Q. Did you also receive a portion of that second group of bonds?

A. Yes.

Mr. Kirkpatrick:

That is all, your Honor.

The Court:

As I understand the rule, he may be interrogated by Mr. Casey, if he so desires, on the subject of the examination.

Mr. Casey:

I have no desire.

The Court:

All right. That is all, Mr. Rocco.

Mr. Kirkpatrick:

Plaintiff rests again, your Honor.

The Court:

This is the final resting?

Mr. Kirkpatrick:

I hope so.

Mr. Harrison:

Does it come around to me again?

The Court:

It isn't quite definite. I don't know whether you want to come forward or not. You may come forward if you wish.

Mr. Harrison:

We have a motion to make again—

The Court:

Members of the jury, I called you down because of a discussion we had in your absence. You have heard some additional testimony which the Court permitted, on the plaintiff's evidence in this case.

At this time, there is a further motion not heard [264] previously, so the jury may again retire to their quarters.

(The jury left the courtroom.)

The Court:

The jury now having retired from the courtroom, we will hear the motion.

Mr. Harrison:

If the Court please, as indicated yesterday, plaintiff having rested, I move that the plaintiff be nonsuited and the action be dismissed as against the Federal Reserve Bank of Cleveland, for the reason that there is no evidence that the Federal Reserve Bank of Cleveland converted the plaintiff's bonds, identified and as alleged in the complaint.

In support of that motion—withdraw that. I have heard other counsel, who are regular members of the bar of this court, I being here by sufferance and courtesy, phrase their motions intended for the same purpose as being a motion to dismiss involuntarily and with prejudice. I think our objectives are the same, and I trust that my motion reaches the objective.

In support of the assertion that the plaintiff has failed to make a case of conversion against the defendant, Federal Reserve Bank of Cleveland, I submit three propositions, although some of them may contain independent ones, I would like to state them, and then make a short argument in explanation of at least some parts of them.

The Court:

All right.

(Note: Change of reporters at this time.)

[265] *Mr. Harrison:*

First, conversion by Federal Reserve Bank of Cleveland is not shown unless there is evidence that the Federal Reserve Bank of Cleveland—and for convenience I will drop the "of Cleveland" hereafter—wrongfully and unlawfully interfered with and disposed of property of the plaintiff.

Assuming that the plaintiff owned the bonds when they left its premises on or about May 2, 1944, there is no evidence that the plaintiff continued to own the bonds when they were received by the Federal Reserve Bank at its Pittsburgh Branch in September and October, 1948, or that the Federal Reserve Bank acted wrongfully or unlawfully in paying the

First National Bank in Indiana, Pennsylvania, for them. Parenthetically, I will state that the letters of transmittal do not indicate any undisclosed principal.

Second: The bonds having been issued by an agency of the United States under United States statutes and official regulations, and Federal Reserve Bank of Cleveland having been and acted as a fiscal agency of the United States and as the obligor on the bonds of the Home Owners Loan Corporation in its handling of the bonds, any and all questions of the propriety of its conduct should be determined under and according to the United States Federal law, and such regulations completely exonerate and immunize the Federal Reserve Bank in this matter.

[266] Third: Due to a remark of counsel, I will say that there is no adequate basis to hold the Federal Reserve Bank on this action or any other kind of a claim, such as for instance the claim for negligence.

Now, in support of those three propositions I will, without repetition, rely on two trial memoranda that I have already submitted to the Court, and will, in the light of a few things that have been said in the course of the trial and since the submission of those memoranda, emphasize certain points as briefly as possible.

The bonds, according to an exhibit that plaintiff has introduced, No. 1-A, included provisions:

> "The corporation will pay principal and interest, when due, at the Treasury Department, Washington, D. C., or at any government agency or agencies in the United States which the

Secretary of the Treasury may from time to time designate for the purpose."

Skipping—again quoting from the bond:

"This bond is issued under the authority of the Act of Congress entitled the 'Home Owners' Loan Act of 1933' as amended (by Act of Congress approved April 27, 1934) which provides that this bond shall be exempt, * * * "

and the quotation goes on, I need not read it, my purpose in reading having been to show that these bonds on their face and by admission of counsel for the plaintiff were issued under the laws of the United States.

[267] The record of this case, including the pretrial, contains some statements which I know the Court has in mind, for convenience of having been grouped in connection with my argument I would like to read certain excerpts. Frankly, I haven't had a chance to check this typing against the record. But I will give the page, and if I make any mistake it can be found and corrected at the time.

Mr. Kirkpatrick at the pretrial conference last week, on October 6, 1954, stated at page 14 of the transcript:

"The documents which Mr. Harrison and I have fussed with so long, the federal regulations, I think make it clear that the Federal Reserve Bank of Cleveland was in the position of acting as agent for the United States Government in paying these bonds. Consequently, I am inclined to think that is liability is asserted against the Federal Reserve Bank it will have to be rested on the fact either that there was

lack of good faith or that they showed carelessness, amounting to negligence, which rendered them liable to us in an actual case of negligence."

There is a similar statement by Mr. Kirkpatrick on pages 16 and 17 of the transcript. He conceded at pages 38 and 40 that the bonds were negotiable but argued that after notice of call for redemption a person having such notice couldn't be a holder in due course.

I pressed Mr. Kirkpatrick to admit that all the [268] Federal Reserve Bank knew about the title and rights of the Indiana Bank to the bonds was contained in the two letters of transmittal. Mr. Kirkpatrick responded—page 47 of the transcript: "How could I possibly admit that, your Honor? The Court: That relieves the bank. Mr. Kirkpatrick: It relieves the bank. I have no basis of making any such admission." Very well. But I inject that there has been a total void of evidence, and hence the Federal Reserve Bank is—to use Mr. Kirkpatrick's word—relieved.

It was also stipulated at that pretrial conference—page 49—that First National Bank in Indiana was a member of the Federal Reserve System through the Federal Reserve Bank of Cleveland at all times material in this case.

Then in the opening statement in the trial that we are now in the process of having—pages 10 and 11—Mr. Kirkpatrick's remark:

"With respect to the Federal Reserve Bank, the situation is different. So far as we know, none of these people actually came in contact with

the Federal Reserve Bank of Cleveland. It received the bonds by mail. Furthermore, we do not contend that it was acting for Mr. Rocco in disposing of those bonds. It was acting as an agent of the Government, in paying the bonds. Here, the Government was obligated on it, and the Federal Reserve Bank was the agency of the Government, designated [269] to make the payment to the person who presented them, or, as we say, the rightful owner.

"So the case as to the Federal Reserve Bank stands in this picture: As to them, we say: 'You received notice in 1944 that these bonds were stolen, and unless there is some explanation as to why you didn't act pursuant to that notice, you paid the wrong person.' But as to these other three defendants, we say, each was the agent of the other, thinking to dispose of these bonds."

Now, the explanation for which Mr. Kirkpatrick called we do not believe needs to be made, for reasons pointed out in the trial memoranda submitted to the Court, namely, that the bonds were issued by an agency of the Federal Government surrounded by law and regulations, the regulations being laws as much as the statutes themselves; and when the plaintiff acquired these bonds it did so charged with knowledge of the law and regulations that surrounded them, and that entered into the obligations of the Government and its paying agents in respect to it. That being the case, the explanation is one provided by law as distinguished from fact.

We have cited in the briefs abundant authority, I submit, for the proposition that the regulations enter into this matter as law.

The Court knows that under the statutes it is particularly true with respect to regulations that are published in the Federal Register. And while the briefs that [270] we have submitted and the answers of the plaintiff to interrogatories identified conceded the authenticity of all the regulations to which we have reference, it is only necessary in disposing of this matter, as far as we maintain, to refer to some that are published in the Federal Register and in the Code of Federal Regulations.

Before calling your attention to some of the provisions of those, although they are mentioned also and quoted from in the trial memoranda, I think that we should—

The Court:

Mr. Harrison, at this point in your argument—having somewhat in mind and under an apprehension that you would make such a motion, and having in mind here the last couple of days—do you consider that I have before me at this state of the case the Federal regulations?

Mr. Harrison:

Yes, your Honor; that you have—

The Court:

What is your position on that, and how do I have them before me?

Mr. Harrison:

That the Federal regulations enter into the matter as law, of which the Court takes judicial notice.

rather than simply as facts. And the references in so far as the regulations that are published in the Federal Register are concerned, and specifically bearing on it, may be found in the Supplement for 44 United States Code, Section 307. There are other general case authorities, it [271] seems to me, that enable the Court at all times to take cognizance of Federal regulations that are brought to its attention as being law.

With that premise—and I may cite authorities a little bit later, quote from authority on it—I think that we should first of all have in mind what is conversion. As I stated in the wording of the first proposition in support of the motion, I emphasized the words "unauthorized" and "unlawful". And I would like, in support of the use and emphasis on those words, to read some elementary propositions, it seems to me, from two authorities.

First, Black's Law Dictionary, Second Edition, page 267, defines "conversion" as

> "An unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of the owner's right."

Again, in 53 American Jurisprudence, pages 819-20, Section 24, it is stated:

> "A conversion is frequently defined as a distinct act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his title or rights therein, or in derogation, exclusion, or defiance of such title or rights."—

Omitting some—

> "Moreover, an act, to be a conversion, must be essentially tortious; a con- [272] version imports an unlawful act, or an act which cannot be justified or excused in law."

That being the case, and the Court having in mind the *Clearfield Trust Company case,* the *National Metropolitan Bank case, Murray v. Lardner,* decisions of the United States Supreme Court cited in the trial memoranda, we can, it seems to me, skip to a case—also cited in the briefs—but one for the court in the Middle District of Pennsylvania, because of the fact that some of the language, it seems to me, is especially pertinent. In the conclusions of the court, pages 75 to 76—the citation, for convenience, is 50 Federal Supplement, 73—in the brief:

> "Because the Federal Government is a party to the contract this is a Federal contract which is necessarily controlled by the Federal law. It is based upon the exercise of the power delegated to Congress to borrow money on the credit of the United States."—

skipping authorities—

> "The Treasury regulations are within the authority given the Secretary of the Treasury by the Congress and have the force of Federal law."—

again skipping citations.

Coming on to the language of the opinion:

> "It is the contention of counsel for the Government"—

While I am not counsel for the Government, I make

the same contention on behalf of the Federal Reserve Bank.—

[273] "that the regulations promulgated by the Secretary of the Treasury in connection with the Second Liberty Bond Act to have the force and effect of law; that the Regulations must be read into the contract between the United States and William G. Garverich so as to become a part thereof; that the laws applicable thereto and which govern the contract and the enforcement thereof are not the laws of the Commonwealth of Pennsylvania, but the Federal laws, which preempt the field of applicable law and preclude the exercise of concurrent authority."—

Skipping some—

"These savings bonds are issued and sold throughout the United States. Application to the issue and sale of these securities of state law would lead to a great diversity of rules regulating title and redemption and would subject the entire financing plan of the Federal Government to exceptional uncertainty by making identical transactions subject to the vagaries of the several states. This constitutes another example in the constantly increasing list of cases where application of the doctrine of Erie R. R. Co. v. Tompkins, *supra*, will lead to more confusion in the Federal law."

So that it seems to me that this case is to be disposed of, as far as the Federal Bank is concerned, on the basis of the law and regulations and the conceded facts or admission of evidence. And of those I would emphasize the following:

First, the notice of call for redemption, which the plaintiff put in evidence as an exhibit—and which also [274] may be found in the Federal Register Volume 9, page 2483. The last paragraph of that notice of call for redemption of these bonds reads:

> "For full information regarding the presentation and surrender of such Home Owners' Loan Corporation 3% bonds of Series A for redemption on May 1, 1944, is contained in United States Treasury Department Circular No. 666, relating to payment or redemption of securities."

I am going to call the Court's attention to certain provisions of that Circular 666. But intervening in point of time there was a regulation known as Memorandum No. 439 of the Treasury Department, also published in the Federal Register for May—this one for May, 1939, at page 2074. It may be found in 24 Code of Federal Regulations, 1939 Supplement, paragraphs 414.0 to 414.6.

I merely refer to this, although I think there are some quotations in the memoranda, as showing that it was arranged by proper regulation that Treasury Department would act for the Home Owners' Loan Corporation in fiscal matters, that the regulations of the Treasury Department were to be applicable in the handling of these Home Owners' Loan Corporation bonds.

The notice of call, as I have said, expressly referred to Treasury Department Circular No. 666. This one was issued July 21, 1941, and it may be found in Federal [275] Register Volume 6, page

3726, dated July 29, 1941, or 31 Code of Federal Regulations, Section 307 to 307.22 in the 1941 Supplement, or in Book 3, pages 2753 to 2760; it may also be found in the later edition, which I realize is after the redemption of these bonds, the 1949 Edition, page 31, Code of Federal Regulations, pages 395 to 401.

Now, there are several paragraphs of this that are pertinent, and we have cited in the trial briefs. I think it is sufficient at the present time to quote from paragraph 307.1, subparagraph (b):

> "Payment. As ordinarily used by the Treasury Department, the term 'payment' refers to the payment of securities at maturity, while the term 'redemption' refers to payment before maturity, pursuant to a call for redemption in accordance with the terms of the security. For the purposes of these regulations, however, the terms are interchangeable and the term "redemption' may refer to a discharge of the security by payment either at maturity or before maturity to a call for redemption."

Then it is recited that the regulations apply to the obligations of agencies of the Government as well —those that have been guaranteed as well as to direct obligations. And in paragraph 307:

> "Coupon bonds, notes, certificates of indebtedness, Treasury bills, and other bearer securities which have become due and payable, whether at maturity or by virtue of a call for redemption before maturity, are payable [276] in due course to the person presenting and surrender-

ing them for redemption, or to such person as he may designate. Such securities should be presented and surrendered, at the risk and expense of the owner, to any Federal Reserve Bank or Branch thereof, or to the Treasurer of the United States, Washington, D. C., accompanied by appropriate written advice."

Then skipping again—

"A Federal Reserve Bank, upon appropriate request, may make payment to a member bank from which bearer securities are received by crediting the amount in the member bank's account."

That regulation leaves untouched the basic regulation which Mr. Duggan has read. The reference in Circular 666 is to the basic one, Circular No. 300, which is published in 31 Code of Federal Regulations as Sections 306.1 and following.

Due to the regulations that I have already read, it is immaterial perhaps that after the redemption of these it does appear for the first time in connection with these regulations, whereas it had appeared in connection with the ones I have already cited.

In Section 306.1 of 31 Code of Federal Regulations, 1949 Edition, the statement—just skipping, for the part that integrates what was provided in Memo 439 and 666:

"Except as otherwise indicated herein, the regulations in this part in so far as applicable likewise govern [277] transactions in issues of bonds as to which the Treasury Department acts as fiscal agent."

Now, since Mr. Duggan has read Section 79 a few minutes ago, I will not do so. I will say that in addition to 79, or perhaps along the same line, there is Section 26. And for the convenience of the Court I have a condensed edition that I can hand to Court and counsel. Section 26 says:

> "United States bonds and notes in coupon form are payable to bearer, and accordingly payment will be made in due course to the person surrendering them for redemption. Coupon bonds or notes which have become due and payable, whether on maturity or by virtue of a call for redemption, should be presented and surrendered to the Treasurer of the United States in Washington or to any Federal Reserve Bank or Branch thereof, at the expense and risk of the holder, should be accompanied by appropriate written advice."

The provision of Section 79, having been read, is not repeated. And I ask the Court to bear it in mind because of the exculpatory and immunity provisions there stated, which, as I have tried to maintain, surrounded the issuance and circulation in handling these bonds from the very inception, and which the plaintiff is charged with knowledge.

Now, that only leaves, as far as I can see, the contention that the Federal Reserve Bank should be held liable on the theory or claim of negligence. I have emphasized that the complaint charges conversion.

[278] *The Court:*

I don't think you need to be heard on that Mr. Harrison.

Mr. Harrison:

Very well.

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[285] *Mr. Harrison:*

If the Court please, I would like to reply to just one short part—

The Court:

Now, wait a minute. You listen to what the Court has to say, and then you won't care whether you reply or not.

Gentlemen, I think this: I have had this matter under consideration, and I wanted to hear your positions again on both sides, in an attempt to see whether anything new would be involved. I have to rule on the facts as presented here in this case by the plaintiff under a motion, which I take to be a motion under Rule 41(b). Plaintiff has completed his presentation of its evidence. A defendant has moved for dismissal on the ground that under the facts and the law the plaintiff has shown no right to relief in this case. [286] And we are dealing here with a factual situation presented and the proof, that bonds of this Home Owners' Loan Corporation were guaranteed by the United States, and under the United States law this one defendant is the fiscal agent of the United States. We have a case then where, as shown by plaintiff's evidence, by mail this bank received these bonds from the Bank in Indiana. We do have a question of notice at least four years back, which would indicate these bonds were being stolen. Well, I think under the law and

the facts as presented here I am bound to grant this motion. Therefore the motion of this defendant for an involuntary dismissal of this action, with prejudice, is granted. I will so instruct the jury.

Are there any other motions or any other matters before the Court?

Mr. Miller, Jr.:

If the Court please, I would like to renew my motion, in view of the fact that the plaintiff's case has been reopened and then closed again, on the same ground.

The Court:

All right. Your motion is refused, Mr. Miller. I understand in this motion I can't reserve decision. I have to rule on it one way or the other when a motion is made at this time.

• • •

[287] *Mr. Duggan:*

And I want to make the same motion that Mr. Miller made.

The Court:

The motion is refused. And the understanding is the other three defendants have made a similar motion, or at least two of them, and the motion is refused, and exception noted.

The Court:

Now, we might as well, while we are here, discuss the order in which these defendants will present their proof. I see you have been in the first seat.

but you are not first named, Mr. Duggan. Perhaps you are anxious to go forward first.

Mr. Duggan:

Your Honor, may I be heard just briefly on my motion for involuntary dismissal?

The Court:

I have ruled on that.

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[297] GILBERT S. PARNELL, one of the defendants, having been duly sworn, testified as follows:

Direct Examination:

By Mr. Duggan:

Q. Give us your full name, Mr. Parnell, please, sir.

A. Well, Gilbert Smith Parnell.

Q. Where do you live?

A. Indiana, Pennsylvania.

Q. Would you mind telling us your age, Mr. Parnell?

A. Fifty-seven years of age.

Q. I believe you are an attorney and a member of the bar of Indiana County, and member of the various appellate courts of this state.

A. That is correct, Mr. Duggan.

Q. And how long have you been a practicing attorney, Mr. Parnell?

[298] A. Since 1923.

Q. And are there any other attorneys in your law firm up there?

A. Yes.

Q. Who are they?

A. The firm is known as Parnell, Handler and Malcolm. There is Earl R. Handler, W. Thomas Malcolm, and my oldest son, G. S. Parnell, Jr.

Q. He just became admitted to the bar recently?

A. That is right.

Q. He is also a member of your firm now. Is that correct?

A. That is correct.

Q. You are the head of that firm?

A. Well, I am a senior partner.

Q. That is a different way of putting it. Mr. Parnell, how long have you been a member of the bar of Indiana County?

A. Since 1923.

Q. And have you been in active practice in Indiana since that time?

A. Yes, sir.

Q. Have you held any public or semi-public positions in connection with your profession during your period of—

A. Well, I was a deputy attorney general at one time, if that is what you mean.

Q. That is what I meant. When was that?

A. That was from about 1935 or 6 to 1941 or 2.

[299] Q. Is your firm engaged in what we might term the general practice of law? In other words, you don't specialize in any particular branch of it. It is a general practice, is it?

A. Well, we have a country law firm, where you are called upon to render general practice.

Q. Yes, sir. Now, there is some testimony that has been introduced before the jury here, that some time, I think in September of 1948, you negotiated the sale of some bonds through the First National Bank of Indiana. Do you recall that testimony?

A. I recall the testimony.

Q. And by the way, are you a stockholder and director of that bank?

A. Yes, I am.

Q. For how long have you been a stockholder and a director?

A. Well, I can't tell you exactly. I would judge about twelve years.

Q. And you were a stockholder and also a director in September and October of 1948?

A. That is right.

Q. Mr. Parnell, during the months of September and October of 1948, there has been some testimony that you left some Home Owners' Loan bonds at the bank for the purpose of redemption. Did you do that?

[300] A. That is correct.

Q. From whom did you receive those bonds?

A. From Arthur Rocco.

Q. Now, did you know of the Rocco family prior to that time?

A. Yes. The father had been in our office, oh, on six or eight occasions, for legal services and work during a period of fifteen to twenty years. I knew of the family, and I think I made the acquaintance of Arthur Rocco in the early fall or late summer of '48.

Q. Now, in connection with what kind of a transaction did you first meet Arthur Rocco?

A. Well, he was getting some legal work and services done there, and was introduced to me by one of my—introduced to me by one of my partners. And we counseled him and advised him on legal matters. He mentioned to me that he had, as I understood it, a distributorship in a certain number of eastern states for the Tucker automobile.

Q. That was the car that there was so such publicity about several years ago?

A. Yes.

Q. That was supposed to be a sensation.

A. Also, as I understood it, there were about five Tucker cars in existence at that time, and Mr. Rocco was driving one of them.

Q. Yes, sir. And was it in connection with that eastern [301] distributorship that he talked to you about? I mean, in addition to other things?

A. As I recall, he mentioned that he was going to invest sixty or seventy thousand dollars in this automobile venture, and I recall he mentioned something about investing in some coal stripping operations.

Q. At that time, what, if anything, was done with reference to these bonds that have been mentioned in this testimony?

A. Well, as I recall, in September, he had nineteen thousand dollars worth of bonds which he asked me to send in for collection or redemption.

Q. That was in September of 1948?

A. That was in September of 1948.

Q. Yes, sir. And did he deliver those bonds to you?

A. That is right.

Q. And when they were delivered, they were to be delivered for redemption. Is that correct?

A. He wanted me to reduce them to cash, and I took them to the bank in the usual course of business, and signed the papers to send them in for collection or redemption.

Q. Now, that is the bank that you are a stockholder in and a director of?

A. That is correct.

Q. And were those bonds afterwards cashed and did you receive the proceeds?

[302] A. Yes. That nineteen thousand was sent in for collection. I signed the papers to send them in.

Q. How did you sign them, do you recall?

A. Down at the bank. I am not too familiar with technical banking, but there is a slip you sign when you send securities in to be sold.

Q. You signed your own name, sir, did you?

A. Oh, yes. I signed my name.

Q. Did you sign as an individual or as attorney or agent, or do you recall?

Mr. Kirkpatrick:

I object. What he signed is the best evidence of that.

The Court:

He may inquire. Proceed.

A. Frankly, I just don't recall. I know I signed my name.

Q. I see. But whether you signed it just your name or as agent or attorney, you don't recall at this time?

A. I really don't recall.

Q. All right. Now then, Mr. Parnell, later on did you receive the money, or was the money from the sale of these bonds credited to your account?

A. As I recall, the money came in, and I was notified it was there, and there was a check drawn to me by the bank for the nineteen thousand.

Q. Yes, sir.

A. And I endorsed the check, in accordance with Mr. Rocco's [303] request, cashed the check and gave him the money.

Q. Do you recall about when that was, Mr. Parnell?

A. Oh, I couldn't tell you the exact day, but I remem-

bered it, by reading the pleadings in this case. It was $19,000 in September, and following that in October sometime, there was thirty-six or thirty-eight thousand.

Q. Then there was another transaction, you say, between you and Mr. Rocco?

A. Yes, there was. After he got these bonds, the money from them, he came in later in the fall, in October, and asked me to send $38,000 worth of bonds in for collection.

Q. Yes, sir.

A. And redemption.

Q. And what did you do when he brought those bonds in?

A. Well, in the usual course of business, I went down to the bank and told them we had a client that wanted these bonds collected. And again I signed whatever paper it is, a sales slip or paper to send these bonds in for collection or redemption.

Q. Do you recall if they were the Home Owners' Loan bonds that have been mentioned in the testimony here?

A. That is my recollection.

Q. Yes, sir. And were those bonds redeemed and was the cash received in due course, through your bank, from the sale of them?

A. Yes.

[304] Q. And then, when you received the notice that the money was available, what did you do with those funds, Mr. Parnell?

A. Handled it in the same manner. There was a check drawn to me from the bank, which I endorsed and cashed and gave the proceeds to Mr. Rocco.

Q. Now, of course, the bank has those checks which you endorsed?

A. I would presume so. They would be in their records.

Q. In other words, you don't have those?

A. Oh, no.

Q. And did you turn that money over to Mr. Rocco?

A. I did.

Q. Now, Mr. Parnell, when did you first receive any knowledge that there was some defect in the title to these bonds?

Mr. Kirkpatrick:

If your Honor please, I haven't objected to leading questions, but I feel I must at this time. I think all the questions have been leading, and I object to the question just put on the ground that it is a leading question.

The Court:

Objection sustained.

Mr. Duggan:

Your Honor, do you find fault with the manner in which that question was framed?

The Court:

You heard the objection, Mr. Duggan. I don't tell you how to examine the witness. That is up to you.

[305] Q. Mr. Parnell, the testimony in this case is that these bonds were what we call "bearer bonds," that they passed by delivery, the same as a dollar bill or five dollar bill. Is that correct?

A. That is my understanding.

Q. Yes, sir. Now then, at the time you left these bonds with your own bank for collection, did you or did you not have any direct notice of any flaw or apparent flaw in the title or ownership of Mr. Rocco to them?

A. I had no knowledge whatever of any question

about these bonds. If I had, I wouldn't have taken them to the bank and signed my name to them.

Q. When did you first learn that there was some question about Mr. Rocco's title or right or ownership in these bonds?

A. It was after the first of the year, I think January or February of 1949, when, much to my surprise, the word came back there was a question about these bonds.

Q. That was practically four months after you had left the bonds for redemption and had paid over the cash that was received as a result of the sale.

A. Approximately four months.

Q. And can you tell us, Mr. Parnell, through what channel you received that information?

A. Well, as I recall the matter, the word came to the bank, and then the bank called me. I think that is right. I [306] don't recall exactly.

Q. You say that was approximately four months after you paid the money over to Mr. Rocco?

A. Approximately four months afterwards.

Mr. Duggan:

Cross examine.

Cross Examination:

By Mr. Kirkpatrick:

* * *

[323] Q. Now, coming down to the transaction, Mr. Parnell, in September, around September 25, 1948, having to do with the bonds of Home Owners' Loan Corporation, amounting to, I think you said your recollection was around $19,000 and the complaint says $19,600. You know the transaction to which I refer?

A. I know the transaction.

Q. Now, is it your testimony that the first you knew about those Home Owners' Loan Corporation bonds is when Mr. Rocco [324] brought the $19,000 or $19,600 of those bonds to you on or about September 25, 1948?

Mr. Duggan:

Wait a minute. I am not sure I heard that question. May I have the reporter read it?

(The question was read.)

A. Now Mr. Kirkpatrick, that is six years ago, and I don't know whether he mentioned them to me on one of his visits into the office or whether that was the first time. I rather think he mentioned them before, that he asked me whether I would arrange to have them left for collection. I am not prepared to say that September, whatever date you said—I am inclined to think he discussed it with me before.

Q. What is your best recollection as to when he discussed it with you, and under what circumstances?

Mr. Duggan:

Keep your voice up.

A. Mr. Kirkpatrick, I couldn't answer that question definitely. It is six years ago.

Q. You have just had a very definite recollection as to what was said in connection with how he won the bonds, didn't you?

A. I have a definite recollection of that. But that is a statement. That is not a date.

Q. I am not asking you about the date of it. I am asking you when you first had any knowledge, from Rocco, Mr. Rocco, [325] concerning the bonds involved in the September 25 transaction.

A. And I am telling you I can't tell you. It is my opin-

ion he discussed the matter with me before he brought the bonds in.

Q. You have an impression that he discussed it with you. What was the discussion?

A. Well, he wanted to reduce these bonds to cash, wanted them left for collection, for the purpose of investing in his Tucker distributorship, and this coal stripping venture.

Q. Isn't it a fact, Mr. Parnell, if this refreshes your memory, that he showed you a bond of the Home Owners' Loan Corporation and asked you if you could dispose of such bonds?

A. That could be. I'm telling you, I can't remember, accurately, six years hence, just when it was.

Q. Well, you wouldn't deny that that was what happened?

A. I wouldn't deny that, Mr. Kirkpatrick, at all.

Q. Trying to refresh your memory, do you recall seeing a single bond, at sometime prior to seeing the forty-three bonds making up the $19,600 in bonds?

A. Are you ready for the answer?

Q. Yes.

A. Mr. Kirkpatrick, I can't recall that. It could be either way.

Q. I show you, Mr. Parnell, Plaintiff's Exhibit No. 1, being [326] one of the bonds involved in this suit, and ask if that refreshes your recollection in any way as to whether or not he first brought to you a single bond.

A. Mr. Kirkpatrick, I couldn't answer that. I don't know. It could be either way. I know I took them down to the bank and left them for collection.

Q. Had you previously frequently taken bonds for collection from people, Mr. Parnell?

Mr. Duggan:

That is objected to as incompetent, irrelevant, and not proper cross examination.

The Court:

Objection overruled.

A. In the course of our law practice, we have occasion to send checks in for collection, bonds in for collection, stock, and so forth, from time to time.

Q. Can you give me any previous instance in which you sent in for collection $19,600?

A. No, I can't say I can give you that. Since that time, in my partner's death, I had to sell some bearer bonds, to pay income tax and legacies.

Q. Now, did you examine these Home Owners' Loan Corporation bonds at all, when they were presented to you, Mr. Parnell?

A. Frankly, I didn't, Mr. Kirkpatrick. I don't claim to know much about bonds. I took them down to the bank and left them for collection.

Q. Now, you have just told me you don't recall whether or not [327] you saw them, but you can tell me definitely that you didn't look at them.

A. Just a minute. What is that question again?

Q. I will ask the reporter to read it. (The question was read.)

A. Mr. Kirkpatrick, I told you that Mr. Rocco gave me the bonds. I didn't pay too much attention to them, I took them down to the bank and left them for collection. That is my recollection.

Q. There were $19,600 worth of bonds involved in this transaction, were there not, Mr. Parnell?

A. That is my—

Q. Did you give Mr. Rocco a receipt for them?

A. No.

Q. Did he ask you for a receipt?

A. No.

Q. He just handed you $19,600 worth of bonds?

A. Well, we do business that way up in the country. We are not distrustful of one another.

Q. You didn't look at the bonds, for example, to see how many coupons were on the bonds?

A. No, Mr. Kirkpatrick, I didn't. I simply took them down to the bank and left them for collection.

Q. Did you know that the bonds had been called for redemption, Mr. Parnell?

A. I did not.

[328] Q. How did you know to take them to the bank for collection, if you didn't know they had been redeemed, called for redemption?

A. I took those bonds down to the bank and told them I had a client that wanted the cash, and I understood later they sent them in for redemption.

Q. And you have so averred in your answer, under oath, that you took them from Mr. Rocco, for redemption, have you not?

A. Well, that is what I am—

Mr. Duggan:

That is what he says now.

A. What I am trying to say now.

Mr. Kirkpatrick:

He is also saying that he didn't know they had been called, if I understand correctly.

Mr. Duggan:

That is a different question.

Q. Did you know that the bonds had been called?

A. No, I can't say that I did.

Q. When you took them down to the bank and talked with Mr. Straitiff, what did Mr. Straitiff—did he inform you that the bonds had been called for redemption?

A. I can't be positive about that. He said he would send them in for collection or redemption, or whatever the word is.

* * *

[329] Q. Coming to the October 28 transaction, involving $38,000 in bonds, did you give Mr. Rocco a receipt for those bonds?

A. No. That is not our practice up there.

Q. Did you examine those bonds when they were presented to you?

A. Not particularly, Mr. Kirkpatrick. As I say, I am not familiar with bonds. I took them down to the bank, told them we had a client that wanted the money, and they were sent in for collection or redemption, or whatever they do.

Q. You say you are not familiar with bonds, Mr. Parnell. Do [330] I understand you to say that you have no knowledge with respect to bonds?

A. No, Mr.—

Q. Let me put it this way. Do you own any bonds yourself?

A. Yes, I own a few. War savings bonds.

Q. And you testified previously, I think, that you had in the course of your business also disposed of other bonds for clients.

A. From time to time, we are called upon to do that.

Q. Are you trying to give us the impression now that you really know nothing about bonds?

A. Mr. Kirkpatrick, I am not saying my mind is a com-

plete blank about bonds. But I don't pretend to know the details of securities, stocks and bonds. I rely on the people at the bank.

Q. Whom did you talk to at the bank regarding the second group of Home Owners' Loan bonds? That is the $38,000 in October of 1948?

A. I talked to the cashier, which is the normal way I do business there.

Q. That is with Mr. Paul Straitiff?

A. That is correct.

Q. Now, coming to the proceeds of the bonds, Mr. Parnell, would you tell me, according to your best recollection, just what you did when you were notified that the money was [331] available at the bank, in September, on these Home Owners' Loan Corporation bonds?

A. Mr. Kirkpatrick, you have been reading from the record there, my testimony there is this: That I wasn't even in Indiana when the proceeds of the first bonds came in; that my partner, Mr. Handler, obtained the money from the bank and turned it over to Mr. Rocco.

Q. Now, would you just answer my questions? I wasn't asking you from the record. I am asking you what your testimony is now.

A. Well, I am trying to answer, that I did not—you asked me how I handled the money in the first transaction?

Q. That is right.

A. I am telling you I didn't handle it. My partner did.

Q. All right. I show you a check, Mr. Parnell, which has been introduced in evidence as Plaintiff's Exhibit No. 15, being the check made payable to Gilbert S. Parnell, Sr., attorney at law, in the amount of $19,590. Would you look at that check, please?

Mr. Duggan:

May I ask you if that is in connection with the payment of any of the bonds that are presently before the Court?

Mr. Kirkpatrick:

I think the witness has made it amply clear that it is payment for the bonds described in Paragraph 7 of the complaint, Mr. Duggan.

[332] *Mr. Duggan:*

All right. If that is the case, all right. I was thinking it was West Penn bonds. We have been talking about them, which are not a part of this case.

A. I have examined that.

Q. Is the signature on the back of the check your signature?

A. Yes.

Q. Well now, will you explain to me, just how the proceeds of this—how this check was collected?

A. I have already told you that the bank gave me that check. I endorsed it, cashed it, and gave the money to Mr. Rocco.

Q. I know, but I thought you just told me earlier that in this transaction, your partner collected this.

A. You are confusing two transactions, Mr. Kirkpatrick. You first asked me about September 10, and that is when my partner, Earl Handler, obtained the money from the bank. Now this transaction, I did.

Q. All right. Now, let's instead of referring to the other record, let's just talk about what you can tell me now. Will you just tell me, first, when you got this check, and where you got it?

A. Mr. Kirkpatrick, the check will show for itself, when

it is dated. It was given to me. I endorsed it, cashed it, and gave the money to Mr. Rocco.

Q. Approximately on the date of the check, would you say?

A. Approximately.

[333] Q. Which would be October 21, 1948?

A. Approximately that time.

Q. What I am getting at, Mr. Parnell, did you take the check to the bank and receive the cash for it, or did you deposit it to your account?

A. No, no, Mr. Kirkpatrick. They notified me that the money was in. I went down to the bank, there was a check drawn to me. That check, I endorsed it, and cashed it, at Mr. Rocco's request, and gave him the money.

Q. Was Mr. Rocco with you?

A. No, he wasn't.

Q. Well, when did you give him the money represented by this check which you received in cash?

A. Mr. Kirkpatrick, I can't answer that, as to time. It might have been a day or two or two or three days, I can't recall that.

Q. Well, you received in cash, Mr. Parnell, $19,590, presumably. Now, what did you do? Did you walk to your office with that in your pocket.

A. Yes.

Q. Now, what did you do with it?

A. Well, it was in my office, and I called Mr. Rocco, and told him his money was at my office. And he came and got it.

Q. Now, did you then, when Mr. Rocco came to your office to get the money, did he receive the full proceeds of this check?

[334] A. You are asking me whether I got any of this money?

Q. You answer my question, Mr. Parnell?

A. I will answer that question. The only money I got from Mr. Rocco was legal fees of $150, plus a retainer fee of $500. That, I did get.

Q. Now, will you answer the question I put to you, and I will move to strike your nonresponsive answer. Did you give the entire proceeds of this check, Exhibit 4, to Mr. Rocco, on the day he came to your office?

A. My answer, sir, is this: I received approximately $650. $150 at one time and $500 another time, and I can't just tell you out of which check they came.

The Court:

Mr. Parnell, you are a lawyer. You heard that question and you know how to answer that. You may answer that question. You will answer the question put to you.

Q. I am asking you, yes or no, if you gave to Mr. Rocco the full amount of this check?

A. I can't answer that. I don't know whether—I actually can't answer that. I know I got that much money, and got 150 at one time and $500 another. And which they came out of, I can't recall at this time.

Q. But your testimony is that with the possible deduction of a total of $650 out of all these transactions, the entire proceeds of Exhibit 4 and Exhibit—

[335] *The Court:*

You haven't asked him about that exhibit. Don't sum up—

Q. I will show you a check, Mr. Parnell, which is Plaintiff's Exhibit 18, and ask you to examine that check before

I ask you some questions concerning it. Have you examined Plaintiff's Exhibit 18?

A. Yes. That is my signature, if that is what you want to know.

Q. The signature on the back is your signature?

A. That is correct.

Q. Now, this check, Mr. Parnell, is payable to G. S. Parnell, attorney. It is $37,980. Now, will you tell me in what form you received the proceeds of this check?

A. The same procedure. I went to the bank, got the check, endorsed it, cashed it, took the money, told Mr. Rocco I had it, and he came and got it.

Q. You did receive cash for the check at the bank?

A. I specifically said that.

Q. All right. I just want to make it clear what we are talking about, Mr. Parnell. Now, did you take this money back to your office? What is your recollection on that?

A. I have already told you in my former answer, that I did call Mr. Rocco and he came and got the money.

Q. We are talking about the other check.

A. You are talking about that one.

Q. Now, I am asking you then, in both checks, your testimony [336] is that you received the money in cash at the bank. Is that correct?

A. I cashed the checks at the bank. Took the cash to my office, called Mr. Rocco. He came and got it in both instances.

Q. In cash?

A. Mr. Kirkpatrick—

Q. That is a simple question, Mr. Parnell.

A. Mr. Kirkpatrick, you have asked me that four times, and I have told you in cash four times.

Q. All right. That is all we want to know. In what denominations did you receive the money?

A. Oh, Mr. Kirkpatrick, I couldn't recall that.

Q. Give me roughly. Did you receive thousand dollar bills, or hundred dollar bills?

A. Well, no. It runs in my mind—I don't recall any thousand dollar bills, and I don't recall any five hundred dollar bills. Hundreds and fifties and so forth.

Q. No larger denominations than a hundred dollars, your best recollection?

A. I don't recall any. There might have been.

• • •

[354] Q. Now, what is your best recollection, in view of the answer just given, Mr. Parnell, as to the date of the first notice you had?

A. As I testified four times already, that my recollection is January or February of 1949.

Q. All right. Now, what is your best recollection of what information the bank had regarding the defect in the title of these bonds?

A. Which bonds?

Q. The West Penn bonds or the H. O. L. C. I understood you said—

The Court:

I think he has been over that. I am not going to permit that. He has been over that part. Proceed to the next question.

Q. Now, as to the H. O. L. C. bonds involved in this suit, what [355] was the information the bank received regarding the defect in these bonds?

Mr. Miller, Jr.:

Now, may the Court please, I object to that, as not within the witness's knowledge.

The Court:

Well, I think the inquiry should be as to what he received, as to the character of the defect.

Mr. Kirkpatrick:

That is correct, your Honor.

The Court:

All right. That is the question for this witness, not a question of what the bank received.

Q. The question is, Mr. Parnell: What information did you receive regarding the defect, or alleged defect, in the title of these H. O. L. C. bonds?

A. Well, again the bank got information there was some question about these bonds, and of course I was called and went down, and we all were very alarmed about it. We didn't expect it, of course.

Q. Well, you say some information. Can't you be more definite for me than that?

A. Well, as far as these bonds you are talking about, that they were missing from a bank in California. There was some stop that had been put on them.

Q. And what else?

A. Well, that is just generally what the situation was.

Q. Well, the bank wasn't alarmed by the fact that the bonds had disappeared in California and that a stop had been [356] placed against them.

Mr. Miller, Jr.:

Just a minute. I object to that, your Honor, as to what the bank was or was not. I don't think that is proper cross examination.

The Court:

I think your interrogation here as to this witness,

what he thought and understood and what he did, aside from the officials of the bank. You are not examining the bank at this time. Any information he got from the bank of course is admissible.

Mr. Kirkpatrick:

All I am objecting to, and trying to develop from him, he keeps repeating "I got some information." Now, I think he can be more definite to me than that.

A. May it please the Court, I have already said to you they told me there was some question about these bonds.

By the Court:

Q. Well, Mr. Parnell, what was the character of the defect that was brought home to you at the meeting with the bank?

A. That these particular bonds had been taken from some bank in California.

Q. Unlawfully taken? You understood that they had been unlawfully taken—that that was the information?

A. I can't answer that. My information was that they were missing. And the evidence shows that that is what the fact was.

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[362] DAVID R. TOMB, called as a witness on behalf of the defendant, Parnell, having been duly sworn, testified as follows:

Direct Examination:

By Mr. Duggan:

Q. Your full name, Mr. Tomb?

A. David R. Tomb. T-o-m-b.

Q. Where do you live?

A. Indiana, Pennsylvania.

Q. Your profession?

A. Attorney at law.

Q. How long have you been a practicing attorney, Mr. Tomb?

A. Forty years.

Q. Has all of your practice been during your residence in Indiana County?

A. Practically all.

Q. I mean, you have outside work?

A. Yes.

Q. But you have lived in Indiana County for how long? [363] A. I was born in Indiana and have always lived there.

Q. I will ask you whether or not, among your clients, whether the First National Bank in Indiana is one of your clients?

A. Yes.

Q. How long have you been counsel for the bank, Mr. Tomb?

A. Ever since this bank was organized in 1934.

Q. Then of course, as counsel, you are familiar with the transactions that have been presented before the jury at this time, in connection with these Home Owners' Loan bonds?

A. Yes.

Q. I believe the testimony, Mr. Tomb, is that these bonds were left for redemption with the bank in September and October of 1948. I don't have the exact dates. I believe that is correct, is it not?

A. That is correct.

Q. Mr. Tomb, when did the bank first receive any notice as to any imperfection or defect in the title of these bonds?

Mr. Kirkpatrick:

If your Honor please, I have no objection to that question if it is limited to his knowledge.

The Court:

I assume that is what he means.

Mr. Duggan:

Yes, of course.

A. The first notice that the bank had of any alleged defect was—

Mr. Kirkpatrick:

If your Honor please, I notice that the witness is reading from a paper that he seems to [364] have in his hand.

A. This is your letter, Mr. Kirkpatrick. I am just getting the dates from the letter.

By the Court:

Q. Are you using something to refresh your recollection?

A. Yes, your Honor.

The Court:

Counsel may see that, if he wishes. If he is going to use it to refresh his recollection, counsel may look at it.

(The paper was shown to counsel.)

(The question and answer were read as follows:

"Q. Mr. Tomb, when did the bank first receive any notice as to any imperfection or defect in the title of these bonds?"

"A. The first notice that the bank had of any alleged defect was—")

A. A letter—

Mr. Kirkpatrick:

I renew my objection and ask that the question be reframed as to his knowledge. That is when, according to his knowledge, did the matter come to his attention.

The Court:

What is the question?

(The question was read.)

The Court:

To your knowledge. That is what it means.

A. It was by a letter received by the bank from Mr. Kirkpatrick, dated January 26, 1951, which was referred to me immediately [365] after the bank received it, which would probably be a day or so after that date.

By Mr. Duggan:

Q. Do you have that letter with you in court, Mr. Tomb?

A. I do.

Q. This letter is from the law firm of Kirkpatrick, Pomeroy, Lockhart and Johnson, and is signed by Mr. Kirkpatrick?

A. Yes.

Q. From whom did you receive that letter, Mr. Tomb?

A. Mr. Straitiff, the cashier of the bank.

Q. And I will ask you whether or not you, as counsel for the bank, or any officer of the bank so far as you know, had any notice of any defect in the title of these bonds prior to the receipt of that letter.

A. No. None whatever.

By Mr. Casey:

Q. What was the date of that letter?

A. January 26, 1951.

Q. That was four and a half months after the bonds had been sent through the bank for redemption?

A. Approximately, yes.

Mr. Duggan:

Cross examine.

Cross Examination:

By Mr. Kirkpatrick:

Q. Who was the cashier of the bank all during 1948, Mr. Tomb?

A. Mr. Paul J. Straitiff.

[366] Q. Was he also vice-president of the bank, if you know?

A. No, he wasn't.

Q. Is the cashier the chief operating officer of the bank?

A. Yes.

Q. I understand your testimony to be, then, that so far as comes within your knowledge, the first notice coming to you was when my letter of January 26, 1951, was brought to your attention.

A. That is correct.

Q. And who brought that letter to your attention, sir?

A. Paul J. Straitiff, cashier of the bank.

Q. Did you subsequently reply to that letter, Mr. Tomb?

A. I did.

Q. Did you make an investigation of the facts before replying to the letter?

A. I did.

Q. And with whom did you talk?

A. I talked to Mr. Parnell, Mr. Straitiff, and Mr. Walker, who was the assistant cashier of the bank and who is now deceased, but who is the party who wrote the letters which are in evidence, forwarding the bonds to the Federal

Reserve Bank. Those, so far as I knew, were the only parties who had any part in the transaction.

Q. I am looking for your letter, Mr. Tomb.

A. I have a copy of it here. Of course, I think you have the [367] original.

Q. I do have it. I can't locate the original, sir. Would you mind reading for the record the copy of the letter just so we may have it?

Mr. Kirkpatrick:

Your Honor, I will wait and find the original, if you like, sir.

The Court:

Let's see whether that is cross examination. We don't want to clutter the examination.

Mr. Duggan:

I am not going to object to it, your Honor.

The Court:

The Court has something to say about these matters. This witness was called here and testified on one point, as to when the bank received notice. He may be cross examined on that point. We will not go beyond that point.

Mr. Kirkpatrick:

That is the only question I have.

The Court:

One step leads to another. We will stop at a certain point. I don't see that that has any bearing on the cross examination.

Mr. Kirkpatrick:

I have a question, your Honor, I would like to ask

the witness. But in fairness, I would like to come to side bar and give other counsel an opportunity to be heard with respect to it, before I propound it.

(At side bar.)

Mr. Kirkpatrick:

If your Honor please, the question [368] which I have in mind relates to the fact that in January of 1949, Mr. Rocco was indicted, and Mr. Straitiff and Mr. Parnell were witnesses. I don't know whether Mr. Tomb has knowledge of that. I don't want to prejudice these people by bringing it in, and I don't want to embarrass Mr. Tomb.

The Court:

As I understand his testimony, he got notice when?

Mr. Duggan:

In January of 1949.

The Court:

'49 or '51?

Mr. Kirkpatrick:

'51.

Mr. Pomeroy:

Two years and four months, your Honor.

Mr. Kirkpatrick:

I don't want to attack this man.

The Court:

The point here is, he may be under some misinterpretation of whether demand or notice. That letter makes a demand on them. Parnell has testified that the bank had notice of this thing in '49.

Mr. Duggan:

That is exactly right. January, '49.

The Court:

That letter is the first, his testimony is. I don't know whether he wants to clarify it or if you want to give him a chance to explain it.

Mr. Kirkpatrick:

I just don't want to attack this man. It is a misunderstanding.

The Court:

I think this witness is under a misapprehension, when demand was made, rather than notice of a
[369] defect.

Mr. Duggan:

We can clear that up.

Mr. Kirkpatrick:

It is going to lead into many things. I would object to the question.

The Court:

His testimony is very contradictory, inconsistent with Parnell's testimony as to when the bank got notice.

Let me see the letter.

Mr. Duggan:

It has been my impression all along that they got this notice in January of '49, about the defect in the title.

The Court:

The point here, the reason I think it is apparent, gentlemen, why I suggested, at least, and stopped

the introduction of the reply to this letter, on the cross examination. Unless his reply contradicts what he says, there is no point in having it in the record. It isn't admissible, at this point.

That is up to you. You have one witness saying two years different than the other. His statement is totally inconsistent.

That is the point. I think perhaps you had better interrogate him.

Mr. Duggan:

May I speak to him privately about the date when he first got actual notice?

Mr. Pomeroy:

Why can't we interrogate him?

[370] *The Court:*

Let me talk to him.

(In open court.)

By the Court:

Q. Mr. Tomb is it?

A. Yes, your Honor.

Q. This letter you used to refresh your recollection was in 1951. You recall Mr. Parnell's testimony that as far as he knew, the bank had knowledge of that some four and a half months later. I assume from the question of Mr. Duggan, that he expected you to say that the knowledge came to the bank four and a half months after the transaction, the first time. I am wondering whether or not you are not mistaken as to the difference between notice and demand. This letter purports to be a demand by Mr. Kirkpatrick, upon the bank.

A. Well, I think, your Honor, the point there is that the

demand was made on the bank four and a half months after the bonds were sent through for redemption.

Q. Yes.

A. But there was no stop on these bonds, or any notice of any defect in them whatever. They were paid promptly by the Federal Reserve Bank—

Mr. Kirkpatrick:

Your Honor, that—

Q. That isn't what I am getting at. You recall Mr. Parnell's testimony, do you?

[371] A. Yes.

Q. As to when he got notice, as to when there was a possible defect in the title?

A. Yes, I do, your Honor. And I think—

Q. You place it some two years and four months after Mr. Parnell places it. And I am just wondering, from the purport of that letter, whether or not you are a little bit under some misapprehension as to what Mr. Duggan was questioning you about. That is all.

A. No, I think not, your Honor.

Q. All right, we will leave it.

A. The bonds that he was talking about were the West Penn Power—

Mr. Casey:

Just a minute, please. We are getting into collateral matters.

The Court:

We will leave it there. If you are satisfied that you answered correctly, that is all there is to it.

A. This is the first notice that I had—

Q. All right?

A. When this letter was handed to me.

Q. That is the first notice you had?

A. That is what I am intending to testify here to, that this was the first notice that I had of any defect, alleged defect in the title to these bonds.

[372] *The Court:*

All right. Proceed.

By Mr. Kirkpatrick:

Q. I have only one further question. Were you counsel for the bank in 1948, '49, Mr. Tomb?

A. Yes.

Q. That is all.

Mr. Duggan:

Your Honor, as to the defendant, Gilbert S. Parnell, that is our case and we rest.

The Court:

All right. I understand Mr. Parnell rests his case.

DEFENDANT PARNELL RESTS.

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* * *

[376] *Mr. Miller, Jr.:*

May the Court please, I have certain offers of admissions at this time.

The Court:

All right, we will take them up.

Mr. Miller:

First, I offer the sub-paragraph (a) of Paragraph First of the answers to defendant First National Bank in Indiana's requests for admissions. That is the answers by the plaintiff—to the extent only as qualified in the answer of the plaintiff.

The Court:

You may read those items in the record, so that the jury hears them, those that are admitted. If there is any objection, Mr. Kirkpatrick, I am sure, will state it.

Mr. Miller:

Subparagraph (a).

That all of the bonds described in Paragraph 7 of the complaint were payable to bearer.

Mr. Kirkpatrick:

No objection.

The Court:

That is admitted in evidence.

Mr. Miller:

And I offer next the answer to request for admission, subparagraph (b) of paragraph First:

[377] That on September 28, 1948, Gilbert S. Parnell, an attorney at law, delivered the bonds described in paragraph 7 of the complaint to defendant First National Bank in Indiana.

Mr. Kirkpatrick:

No objection.

The Court:

Admitted.

Mr. Miller:

I offer subparagraph (c).

That on September 28, 1948, defendant First National Bank in Indiana, by registered mail, sent said bonds described in paragraph 7 of the

complaint, to the Pittsburgh Branch of the Federal Reserve Bank, fiscal agent of the United States, Pittsburgh 19, Pennsylvania.

The Court:

That is also admitted.

Mr. Miller:

May the Court please, I offer answer to interrogatory No. 11, filed by the Federal Reserve Bank, defendant above named, I believe subsequent to that time. The matter has been admitted also here in trial, previously.

If I may confer with counsel a second, I think can have an understanding in that regard.

And that a photostatic copy of the letter accompanying said bonds, attached to the answer filed by the defendant bank and marked Exhibit 1, is a true and correct copy of the letter transmitting said bonds to the Federal Reserve Bank by First National Bank in Indiana, except for the apparent handwriting and check marks appearing thereon.

The Court:

That is your letter.

[378] *Mr. Miller:*

That is the First National Bank's letter.

I should like to call to the attention of the jury that that is a letter that has been introduced previously and is our letter to the Federal Reserve Bank.

The Court:

That is admitted in your case.

Mr. Miller:

I offer in evidence answer to requests for admissions, subparagraph (d).

> That pursuant to instructions in said letter, the Pittsburgh Branch of the Federal Reserve Bank, fiscal agent of the United States, upon receipt of said letter and said bonds, on the 30th day of September, 1948, deposited to the credit of the First National Bank in Indiana, Pennsylvania, *inter alia* the proceeds of said bonds, namely, the sum of $19,600.00. A photostatic copy of said credit deposit slip being hereto attached, made a part hereof, and is marked "Exhibit 2."

I call to the attention of the jury that the deposit slip is the deposit slip which has been introduced in evidence and you have had the opportunity to witness previously.

I offer subparagraph (e) of the request for admissions:

> That thereafter, on October 1, 1948, First National Bank in Indiana, named as a defendant in the above case, paid to the said Gilbert S. Parnell, attorney (less $10.00 [379] expenses), the sum of $19,590.00. A photostatic copy of the cashier's check in payment thereof to said Gilbert S. Parnell, Sr., attorney at law, is attached to the answer filed and is marked Exhibit 3.

This is the exhibit, our Exhibit 3 in the answer, and is that check which I think the jury is entirely familiar with.

The Court:

Those are admitted.

Mr. Miller:

I now offer answer to request for admission subparagraph (f) of the second paragraph of our request for admissions, as qualified by the answer of plaintiff:

> That all bonds described in paragraph 11 of the complaint were payable to bearer.

I would like to mention, in qualifying that, that this refers to the second group of bonds.

The Court:

I think that is understood. That is admitted.

Mr. Miller:

I offer answer to request for admission, subparagraph (g):

> That on October 25, 1948, Gilbert S. Parnell, attorney at law, delivered the bonds described in paragraph 11 of the complaint to defendant, First National Bank in Indiana.

I offer answer to request for admissions, subparagraph (h):

[380] That on October 25, 1948, First National Bank in Indiana, by registered mail, sent said bonds, being second ones described in paragraph 11 of the complaint, to the Pittsburgh Branch of the Federal Reserve Bank, fiscal agent of the United States, Pittsburgh 19, Pennsylvania, and that a photostatic copy of the letter accompanying said bonds, attached to the answer filed by the defendant and marked Exhibit 4 is a true and

correct copy of the letter transmitting said bonds to the Federal Reserve Bank by First National Bank in Indiana, except for the apparent handwriting and check marks appearing thereon.

I call your attention to the fact that these are the letters at the time the second group of bonds were sent in.

I offer subparagraph (i) of our request.

That pursuant to the instructions in said letter, Pittsburgh Branch of the Federal Reserve Bank, fiscal agent, upon receipt of said letter and said bonds, on the 26th day of October, 1948, deposited to the credit of the First National Bank in Indiana the proceeds of said bonds, namely the sum of $38,000.00. A photostatic copy of the credit slip is attached to the answer.

That is the photostatic copy which is introduced in evidence for you.

Subparagraph (j):

That thereafter on the 28th day of October, 1948, the First National Bank in Indiana, named [381] as a defendant, paid to the said Gilbert S. Parnell, Sr., attorney at law, the proceeds received for said bonds, less $20.00 expenses, the sum of $37,980.00. A photostatic copy of the cashier's check in payment thereof is attached to the answer filed and is marked Exhibit 6.

That again is the second cashier's check, which has been in evidence before you, ladies and gentlemen.

May the Court please, I have certain other offers for admission, which I now believe, as a result of prior circumstances, are in a sense matters that the

Court has already taken judicial notice of. That refers to the requests for admissions by the Federal Reserve Bank, in which counsel for plaintiff admitted to a large number of the regulations which applied to these government bonds.

I propose to have the record show that these government bonds were subject to these federal rules and regulations, if the Court will take judicial notice of it.

To that extent, it may be necessary in my closing, if I need—

The Court:

I think my ruling, necessarily, as to the Federal Reserve Bank, includes judicial notice of the facts as adjudicated by the United States Courts, as I take it, that the laws of the United States, rules and regulations of the Treasury Department as mentioned by Mr. [382] Harrison, are the law of this case. In other words, so far as these bonds are concerned.

Mr. Kirkpatrick:

If your Honor please, as I previously indicated when your Honor made that ruling, I agree that as to the extent of federal regulations the Court probably takes judicial notice of them without proof.

The Court:

Whether they help him or not, this bank, is a different thing.

Mr. Kirkpatrick:

That is right. I wish to point out that as to these defendants we say they are irrelevant and immaterial.

The Court:

We are just talking about the general law, generally.

Mr. Miller:

I just wanted to confirm the fact that that is the Court's attitude.

The Court:

You may talk about them, Mr. Miller. If you think they apply, you may talk about them.

Mr. Miller:

Thank you.

I will call Mr. Paul J. Straitiff to the stand.

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[383] PAUL J. STRAITIFF, called as a witness on behalf of the First National Bank in Indiana, having been duly sworn, testified as follows:

Direct Examination:

By Mr. Miller, Jr.:

Q. Mr. Straitiff, will you state your name, please?

A. Paul J. Straitiff.

Q. Where do you live, Mr. Straitiff?

A. Indiana, Pennsylvania.

Q. How long have you lived in Indiana?

A. 1930. Since 1930, I believe.

Q. How large a town is Indiana, if you know, Mr. Straitiff?

A. Approximately ten thousand.

Q. What is your occupation, Mr. Straitiff, now?

A. I am a partner in an automobile agency.

Q. And what was your occupation prior to that?

A. Cashier, First National Bank in Indiana.

Q. And how long were you thus employed as cashier?

A. I organized the bank in 1934, and was cashier at that time.

Q. When did you terminate your services with the bank?

A. 1951, in the fall.

Q. Then, Mr. Straitiff, you were the cashier of the bank during the period of 1947, '48, and '49?

A. Yes, sir.

Q. And I believe you stated you were cashier of the bank prior [384] to that time for quite some number of years?

A. Yes, sir.

Q. Mr. Straitiff, I am placing before you certain exhibits, which are identified herein as Plaintiff's Exhibit No. 13, No. 16, No. 17, No. 14, No. 18 and No. 15, and which are also exhibits of the defendant, First National Bank, and ask you if you recognize them.

A. Yes, I do.

Q. Now, those exhibits refer to the bonds, the subject which has been talked over in the court here for several days. Is that correct?

A. That is right.

Q. Mr. Straitiff, will you tell us when you first came to have any dealings with reference to the bonds, the subject of those exhibits and this action? I think you may use the exhibits to refresh your recollection, if you wish.

A. Well, the bonds—the first bonds were brought into the bank—I am going to use these dates, because I don't remember dates.

Q. That is perfectly all right.

A. September 28, 1948.

Q. Now, confining yourself to the first group of bonds, for the purpose of clarity here, what did you do when they were brought in to the bank?

A. The bonds were sent to the Federal Reserve Bank for collection [385] and redemption. Mr. Walker, the assistant cashier, sent them in. His letter—he signed the letter.

Mr. Duggan:

Would you keep your voice up, Mr. Straitiff, please?

Q. What next occurred after they were sent in for redemption?

A. Well, after we sent them in, a credit was issued by the Federal Reserve Bank. We notified Mr. Parnell that the credit was given to us. We wrote a cashier's check to him, in payment of the bonds, less the deduction for expenses of the bank.

Q. How much was that deduction, in the first instance?

A. I don't remember, sir. Eight or—it was the cost of the postage and insurance plus, I think, $1.50 for the transaction. That is what the bank charges, if I remember correctly. Probably eight or nine dollars. I don't know.

Q. How did you receive notice from the Federal Reserve Bank?

A. Notice of credit, by mail.

Q. Was that the customary manner of receiving such notice?

A. Yes. Usually that was the way we received it.

Q. Then what did you do after you received the notice of credit?

A. Wrote a—called Mr. Parnell, told him the money was in, and wrote a cashier's check to him for the amount.

Q. Now, did you, at any time during your dealings with these bonds, have any knowledge or notice of any defect or infirmity of any kind, with reference to these bonds?

[386] A. No, sir.

Q. Is Mr. Walker available to testify at the present time? The Mr. Walker whom you referred to?

A. He is not.

Q. Why?

A. I believe he is deceased.

Q. You believe it. Do you know that he is deceased?

A. I saw him dead; yes.

Q. Now, with reference to the second group of bonds, will you state generally what you did in that instance?

A. Well, it was about the same way it was handled. The bonds were brought in to the bank. I am not even sure that I handled them, but they went through the regular procedure. Mr. Walker wrote a letter to the Federal Reserve Bank with the numbers, and so forth. They were collected, credit was given to us, by a credit receipt from the Federal Reserve Bank. We notified Parnell, and then wrote a cashier's check to him for that amount.

Q. Did you have any notice or knowledge of any defect or infirmity of any kind in these bonds?

A. No, sir.

Q. Was the bank a party to any transactions or matters with regard to these bonds, other than what you have described here at the present time?

A. I don't understand your question.

[387] Q. I can't blame you. Did the bank have any other dealings with these bonds, in any way other than what you have described here?

A. No. We received them and collected them. That is all.

Q. Did the bank receive any monies other than the monies which you have described here, with reference to these bonds?

A. No, sir.

Q. By the way, Mr. Straitiff, did the bank have a ticker tape at the time you were connected with them?

A. No, sir.

Q. Did the bank, from your own personal knowledge, have any notice of any kind whatsoever with regard to these bonds, as to any defect or infirmity in them?

A. Will you confine that to what time?

Q. During the year previous to the transaction?

A. Oh, no. No, sir.

Q. During any time prior to the transaction, do you know?

A. Not to the best of my knowledge; no, sir.

Mr. Miller, Jr.:

May the Court please, I want the record to show that we offer separately the exhibits as were identified by the witness here, also.

I think it is quite clear. I want our case to show those exhibits.

The Court:

Those are admitted on behalf of the defendant. Bank of Indiana.

[338] *Mr. Miller, Jr.:*

You may cross examine.

Cross Examination:

By Mr. Kirkpatrick:

Q. Mr. Straitiff, were you also a director of the First National Bank of Indiana in 1948?

A. Yes, sir.

Q. How long had you been such a director?

A. From the inception of the bank in 1934.

Q. The next series of questions, Mr. Straitiff, are addressed to the bonds in this suit, involved in the September 28, 1948 transaction.

A. May I refresh my recollection?

Q. Surely. Was your first knowledge concerning these bonds obtained when Mr. Parnell brought them to the bank on or about September 28, 1948?

A. Yes, sir.

Q. On that day, he brought them to the bank and talked with you, I think he testified. Is that correct?

A. Yes, that is right. Yes, sir.

Q. Now what did he ask you to do with the bonds?

A. He asked us to cash them—to not cash them, collect them. That was the word he used, I believe. To collect them. I think so. It was a long time ago, Mr. Kirkpatrick.

Q. Did you know that the bonds had been called for redemption?

A. Oh, yes. Yes, sir.

[389] Q. And you mean you knew when they were shown to you by Mr. Parnell?

A. Yes. Yes, sir.

Q. That they had been called for collection?

A. Yes, sir.

Q. Then, after the Federal Reserve Bank had credited the proceeds, I think you testified you called Mr. Parnell and told him the money was there.

A. Yes, sir.

Q. Correct?

A. That is correct.

Q. Can you recall at this time just exactly what you said to Mr. Parnell?

A. I am not even sure I talked with Mr. Parnell. I called his office, and said that the bonds that had he sent in, they were collected and the money was available. I believe that is exactly right.

Q. And then did Mr. Parnell call at the bank and receive a cashier's check?

A. Yes, sir.

Q. And is that the check which has been identified as Plaintiff's Exhibit 15?

A. Yes, sir.

Q. Now, Mr. Parnell testified, I think, that this check was cashed by him. Did you hear him so testify yesterday? [390] A. I did.

Q. And that he received the proceeds of the check in currency?

A. That is right.

Q. And I think he testified that he received the currency in donominations of one hundred dollars and smaller. Do you recall that testimony?

A. I recall the testimony, but I would not attempt to say what size the bills were, the denominations. We didn't carry anything above a hundred dollar bill in the bank, so they would have to be a hundred and smaller.

By the Court:

Q. What was that answer, Mr. Straitiff?

A. We didn't carry any bills of larger denominations of one hundred dollars in the bank, so it would have to be that or smaller.

By Mr. Kirkpatrick:

Q. If I were to ask you the same questions regarding

the transaction by the bank, with respect to the bonds involved on October 25, would your answers be the same?

A. Yes, approximately the same. I think it was about the same—all of this stuff follows the same procedure.

Q. Now, I think you testified, Mr. Straitiff, in response to a question by Mr. Miller, that the bank had no notice of any defect or infirmity of these bonds, until, I think, you said until the time of the transaction. Just when did [391] you mean that you first acquired any notice with regard to the possible infirmity in these bonds?

A. A half an hour ago, I could have answered that question. Now I can't. I heard Mr. Tomb's answer, and I remember Mr. Parnell's answer. I thought it was the letter we got from you. But I believe I heard of it, at least, earlier. But long after they were cashed, of course. But I can't—I can't, by any—it just doesn't come to me when it was. And that knowledge came through the F. B. I.

Q. How did it and when did it come?

A. When they came in to talk to me concerning bonds.

Q. Can you give me the date of that?

A. I can not give you the date of that.

Q. Can you give me the approximate date?

A. I couldn't even give you the year of that, Mr. Kirkpatrick. I don't remember. That is just—I just thought of that now. I am quite sure my answer would have been the same as Mr. Tomb's, because that was the first—but I've been trying to think, and now I don't know.

Q. I understand you to say that your answer prior to hearing the testimony in court would have been that the first notice coming to you regarding the defect in these bonds, was when I made demand in January of 1951.

A. That's right. That is right.

Q. Now, when the F. B. I. came to see you regarding some of the [392] bonds, do you recall—the first time they came—was it regarding the Home Owners' Loan Corporation bonds?

A. No, it wasn't.

Q. What bonds did they—

Mr. Casey:

That is objected to as not cross examination. No material value in this case.

Mr. Kirkpatrick:

I think, your Honor, it is important to show to show what notice they had regarding any defect in the bonds received from Mr. Rocco.

The Court:

You haven't asked him about any other series of bonds.

Mr. Kirkpatrick:

That is what I am getting up to.

The Court:

You are going at it backwards. You have asked him about September 28 and October series of transactions.

Mr. Kirkpatrick:

Then I asked the witness, if your Honor will recall, when—he has testified that the F. B. I. at some point came to see him about certain bonds. And the question then I addressed to him was, "Can you tell me as to whether or not, when they first came to see you, they talked about the Home Owners' Loan Corporation bonds or some other bonds?" And I understood him to say that he could not.

The Court:

Could not recall what they talked about.

Mr. Kirkpatrick:

Which bonds. Whether or not they talked about the Home Owners' Loan bonds or some other bonds.

[393] *Mr. Casey:*

If your Honor please, this is cross examination of this witness. It might be important, during Mr. Kirkpatrick's case, to have called a witness and proven it, but on cross examination, that man's attention was directed to two transactions, and it would seem to me that you try collateral issues.

The Court:

I know, but his examination in chief is on the question of notice, on the question which leads to the issue in the case, the time of notice.

Mr. Casey:

I agree with that.

The Court:

One thing, one transaction, notice of one transaction, the result of it, might lead to a duty to inquire as to another transaction. If that is the purpose of it, it is admissible.

Mr. Kirkpatrick:

That is the purpose, your Honor.

The Court:

The difficulty with the position is, he hasn't gone back with this witness as to any other transaction or notice, and so forth. We don't know whether

that is admissible. The objection now is sustained, as of now.

Q. Did the First National Bank in Indiana, in September and October of 1948, receive from Mr. Parnell other bonds to be sold?

Mr. Duggan:

Just a minute. On behalf of Mr. Parnell, that is objected to as incompetent, irrelevant [394] and not cross examination, and not tending to prove any matter now in issue in this particular proceeding.

The Court:

Overruled.

A. Will you read that question.

Q. (The question was read.)

A. I don't know that they—I don't know the answer to that. I don't know. The dates—

Q. You heard the testimony of the witness Parnell yesterday, didn't you, Mr. Straitiff?

A. Yes. If you will refresh me on the date, then I will tell you.

Q. All right. On or about September 10, 1948, did the bank receive from Mr. Parnell $5,000 principal amount United States Treasury bonds?

A. Yes.

Q. And $20,000 principal amount West Penn Power Company bonds?

Mr. Duggan:

That is again objected to, your Honor, as incompetent, irrelevant and immaterial, not tending to prove any issue raised by the pleadings in this case.

The Court:

Overruled.

A. Yes, sir.

Mr. Kirkpatrick:

If I may have the Court's indulgence for a minute, I am looking for a memorandum to refresh my own memory as to the exact dates.

A. I can not remember dates.

[394-A] *The Court:*

We will take a fifteen minute recess at this time.

(A recess was taken at this time.)

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[395] *By Mr. Kirkpatrick:*

Q. Mr. Straitiff, before we adjourned for the recess we had discussed the bonds which were delivered to the bank by Mr. Parnell on September 10. Now, coming down to September 17, 1948, do you recall $20,000 of United States Treasury bonds which were delivered by Mr. Parnell to the bank for sale?

Mr. Duggan:

If your Honor please, we again object, as incompetent, irrelevant and immaterial, not proving or tending to prove any issue raised by these pleadings. The only bonds in issue in this proceeding are the Home Owners' Loan bonds, and they are specified particularly in paragraphs 7 and 11 of the complaint.

The Court:

Now, this question relates to a matter no one has mentioned up to now. Is that right?

Mr. Kirkpatrick:

This is a question of connection with his testi-

mony regarding the first notice of any defect in the bonds received from Mr. Parnell, and it comes in connection with the question that I put earlier to the witness.

The Court:

Well, the Court hadn't heard any other prior testimony from any source as to the particular subject matter of that question that you put.

Mr. Kirkpatrick:

I understand that, your Honor. And your Honor will recall that I was interrogating the witness in connection with his answer on direct examination that the [396] first notice of any defect or infirmity —a very broad answer—that he had was either in 1951—

Mr. Casey:

Your letter of 1951.

Mr. Kirkpatrick:

My letter of 1951.

Mr. Casey:

You didn't write a letter in 1951.

Mr. Kirkpatrick:

And the witness replied that he could now, having heard the testimony both of the witness Parnell and of Mr. Tomb, say whether the first notice he had regarding a defect in any bonds was in 1951 or early in 1949, as Mr. Parnell testified yesterday.

The Court:

I think you can ask him that without bringing in

another matter there, another subject matter, which has not been in the case before. That is the point. I think that objection is well taken. I don't recall hearing anything whatsoever on the subject matter embodied in the question you asked. I think you are entitled to ask him about notice generally as to any transaction he had with Mr. Parnell.

Mr. Kirkpatrick:

All right. I will be glad to confine it to that, your Honor.

The Court:

I think that is proper. The objection is sustained to that extent.

Q. Now, can you tell me now, Mr. Straitiff, as to when you first received any notice with respect to a defect or infirmity, or alleged defect or infirmity, in any bonds that you [397] received from Mr. Parnell?

Mr. Duggan:

Your Honor, I again renew my objection, that it doesn't pertain to the bonds involved in this issue.

The Court:

I understand; but I am going to overrule that objection. I think this question of notice is permissible.

Mr. Duggan:

Very well. Withdraw that objection.

A. Of any bonds?

Q. Yes; received from Mr. Parnell.

A. The first notice we had of any infirmity of title was when the bonds of the—

The Court:

Now, just say when. Just say when. The question just calls for when.

A. I can't say when; I don't know. I can tell when it happened. I don't know.

Mr. Miller, Jr.:

If the Court please, I wonder if the witness might not, in order to clear this matter up, be asked, with reference to a relativity of time rather than—

The Court:

Certainly.

Q. Can you fix the date by reference to any other time, Mr. Straitiff?

A. When the bonds were refused payment—when the coupons were refused payment—when they refused payment, then we got notice from Hemphill Noyes. That was about four months—

Mr. Duggan:

Just a moment. Your Honor, again it [398] gets into irrelevant matter here.

The Court:

It gets into a matter, though, that was brought out in this case, I think by Mr. Parnell. That is all there is to that.

Mr. Casey:

If your Honor please, I have a motion to make at the conclusion of the case relative to that testimony. If the Court please, the witness said some four months after, and evidently it must be four months after the H. O. L. C. bonds, the cashing of those. That is the relevancy as to time.

Mr. Kirkpatrick:

The witness was interrupted, your Honor.

The Court:

I understand. The objection was overruled. So let's hear what the witness was saying. Let's get his answer.

A. Continuing my answer, it was about four months after the first bonds were sent in, this Power—the Power bonds.

Q. That would—four and a half months after that would be early in 1949. Is that correct?

A. That is right; January of 1949.

Q. Now, did the notice of a possible defect come solely from the refusal to honor certain coupons?

A. That is right.

Mr. Casey:

That is objected to, as not cross examination. As far as the notice is concerned, it has been estab-
[399] lished.

The Court:

I think that is a proper objection. You are talking about the notice itself. The objection is sustained, and the jury will disregard it.

Q. Now I show you a bond which has been offered in evidence and received in this case, Mr. Straitiff, as Plaintiff's Exhibit 1, and ask you if that is one of the bonds which the bank received from Mr. Parnell.

A. Well, it was a bond of this denomination anyway.

Mr. Duggan (to witness):

Now, Mr. Straitiff, I am sure the jury can't hear you back here. Speak out.

Q. Will you refer then, Mr. Straitiff, to Plaintiff's Exhibit No. 16, which is the letter of the First National Bank in Indiana, dated October 25, 1948, to the Pittsburgh Federal Reserve Bank, and tell me if the serial number on that bond corresponds to the serial numbers listed in that letter.

The Court:

Now, hasn't that been covered by stipulation?

Mr. Kirkpatrick:

Well, I thought it was, your Honor but this witness—

The Court:

Yes, I think so. And he has talked generally about bonds. I think this is just cumulative on this subject, that is all.

A. Yes, sir.

Q. Now I call your attention, Mr. Straitiff, to the coupons [400] appearing on this bond. The first coupon is a coupon, is it not, for interest due November 1, 1944, in the amount of $15?

A. That is right.

Q. And then will you examine the bond and tell me if there are also attached coupons for interest due May 1, 1945, November 1, 1945, May 1, '46—

Mr. Miller, Jr.:

May the Court please, I have refrained from objection here, but I think the bond speaks for itself, and I object.

The Court:

Well, he may interrogate him about the bonds that were sent, on cross examination.

Q. (Continuing)—and also all subsequent coupons up to—also all subsequent coupons?

A. That is right. November 1, 1944, and subsequent coupons.

Q. Now, did any thought come into your mind as to why those coupons had not been presented for payment?

A. No, sir.

Q. You knew the bond had been called?

A. Yes, sir.

Q. And that interest had not been collected?

A. Yes, sir.

Q. Now, I show you a document, Mr. Straitiff, which has been introduced as Plaintiff's Exhibit 10, being a notice dated May 20, 1944, addressed to all banks and security brokers. [401] Did you hear the stipulation read in this case as to the mailing of this Exhibit 10 to all banks in the Pittsburgh area?

A. I did.

Q. Can you tell me whether or not the notice was actually received by the Bank of Indiana?

A. I don't remember of it being received.

Q. Would you say that it wasn't received?

A. No, I wouldn't say that it wasn't received.

Mr. Kirkpatrick:

I think perhaps we can stipulate, your Honor, that a search of the files of the Bank of Indiana has not disclosed presently any copy of Exhibit 10 in their files.

Mr. Miller, Jr.:

Just a minute. I have not objected to this being beyond direct on that. I will note that, rather than

a stipulation, I propose to call the cashier, the present cashier, of the Bank of Indiana to state that.

The Court:

It is a matter of defense.

Mr. Miller, Jr.:

As part of my proof of my case.

Mr. Kirkpatrick:

Well, I will withdraw the question, your Honor.

May we come to side bar, your Honor, and confer with the Court?

The Court:

Certainly.

[402] (At side bar.)

Mr. Kirkpatrick:

I propose to offer in evidence and identify the witness as the defendant in the proceedings at 13723 Criminal in this court, to impeach his credibility, in pleading guilty to a felony.

Mr. Miller, Jr.:

If the Court please,—

The Court:

Wait a minute. What was the charge? I don't know what he was charged with.

Mr. Kirkpatrick:

He was charged, your Honor, with seven counts, of which six counts charged embezzlement and one count charged false entry. Under the United States Code each count was a felony. On December 3, 1952, he entered a plea of not guilty by Mr. Duggan—par-

don me, I don't think that was so, I think it was some other counsel at that time—but, in any event, on September 2, 1953, he entered a plea of guilty to counts 1, 2 and 3, which are clearly defined as felonies, and upon that sentence was imposed of three years, the sentences to run concurrently,—

The Court:

What section? Was it related to this case?

Mr. Miller, Jr.:

No, it had nothing whatsoever to do with this case. It was in this court. Judge Martin sat. And I have here certain excerpts—I think, as result of Judge Martin's opinion, your Honor, this is clearly inadmissible.

The Court:

Just a minute. I don't think you do it [403] in this way, Mr. Kirkpatrick.

Mr. Kirkpatrick:

Well, I want to make it as easy for him as I can.

The Court:

Well, the correct way to do it, if you are going to do it, is offer it in rebuttal. I don't think you do it in cross examination, he not having testified here to any crimes or not having committed any crimes.

Mr. Kirkpatrick:

It is just a question of him being on the stand. May I not offer the record at that time?

The Court:

I am not telling you how to do it. But I don't think you do, in a civil case, when the man is on the

stand on cross examination. He has not testified to not having committed any crime, and he is presumed to be telling the truth. It just seems to me you have to act in accordance with the regular rules of cross examination. If you could in some fashion lay a foundation at this time, all right. But so far you haven't done it. I think the only way you can do it is to offer the record and identify him and attack his credibility in rebuttal, if at all.

Mr. Miller, Jr.:

I think perhaps we can resolve this whole matter, your Honor, if I can call your Honor's attention to Judge Martin's opinion. I have certain excerpts from that opinion, which stated quite clearly—

The Court:

Did he write an opinion?

Mr. Miller, Jr.:

Well, it was his opinion, his oral [404] opinion—it was taken from the transcript of that record—as to these circumstances and the reason he was taking care of this—in other words, he treated it as purely a technical malfeasance. As a matter of fact, he made the broad statement, "I would trust him with my money." And I think there is in that case no record of anything that would involve impeaching this witness.

The Court:

Well, the trouble is that for impeachment purposes all you have to do is identify the record, identify the witness, if it is a crime involving moral turpitude. That is the trouble with that.

Mr. Miller, Jr.:

This opinion shows that, even though he was pleading guilty—

The Court:

Well, that opinion has been very much criticized, Mr. Miller.

Mr. Kirkpatrick:

May I state my position? I haven't asked the clerk to bring up these papers. It is my understanding that the counts show embezzlement over a long period of time, including—I don't mean including these months, but they show embezzlement over a long period of time. Now, those embezzlements were relatively small—three hundred dollars, four hundred, and seven hundred, and so on. They charge false entry—

Mr. Duggan:

No, no. Now, let's get that straight.

The Court:

Well, all I am ruling now is it is not [405] admissible at this time.

Mr. Kirkpatrick:

May I just state, it is my understanding of the law for the purpose of attacking credibility you may always offer evidence, prove the conviction of a felony. The cases in Pennsylvania clearly say you may offer a conviction of a felony, and secondly, you may offer conviction of a misdemeanor only when it involves what they call *crimens falsi*. This is an embezzlement charge.

The Court:

I understand a somewhat similar crime.

Mr. Kirkpatrick:

That's right. Now, here is a case of straight felony—no question about it under the United States Code.

The Court:

So what? All I am saying is it isn't admissible at this time. I haven't said you couldn't introduce it at the proper time. I think the only way you can do it is to offer it after he has testified. What do you think, Mr. Casey? You are a criminal lawyer.

Mr. Duggan:

May I just make this suggestion, your Honor? There is nothing in his testimony that is in contradiction to all the other testimony.

The Court:

Well, you come back to this, to the regular rules of cross examination, and that is that you examine him in chief—or he is examined in chief, and you cross examine him as to the matters in chief. And if he hasn't testified in this case and it hasn't been brought out, of [406] course it isn't germane as to whether or not the fellow—in this particular instance whether or not he has a good reputation and character or whether he has committed any other crimes. If he has testified to that, for some reason or another, then properly so, and relevant—then, of course, you can ask him, you can go after him with hammer and tongs. But the way I think about it, he not having so testified, I believe the fair way

to do it is in the time-honored way, as I understand it, that you then have a record and identify the man and attack his credibility, the same as if he had been on the stand.

Mr. Kirkpatrick:

In rebuttal in my case?

The Court:

Yes; that is the way I see you have to do it. And then we will argue it out at that time.

Mr. Kirkpatrick:

The fact is there is another witness in the same situation, in the Homer City bank. I have no desire to make things tough for these people, but I think it is going to be worked out, what happened here.

The Court:

Well, I don't know.

Mr. Kirkpatrick:

They had a serious question whether they would call this man or not, and they knew I would comment if they didn't, and they have chosen to call him.

Mr. Duggan:

Your Honor, here is the point I make: He hasn't testified to anything that is diametrically opposed to anything anybody else has said. His testimony re- [407] lated to notice, as does the testimony of everybody else here, and there is nothing to indicate—

The Court:

Well, of course that is for the jury.

Mr. Kirkpatrick:

I am perfectly willing to do it in rebuttal, your Honor.

The Court:

Well, that is the correct way of doing it on the fact situation here, as I see it.

(In open court.)

The Court:

Any other questions of this witness?

Mr. Kirkpatrick:

May I have just a moment, your Honor—I have no further questions of the witness.

Re-direct Examination:

Mr. Duggan:

I have just one or two questions, I think.

By Mr. Duggan:

Q. Mr. Straitiff, in 1948 and '49 was there a brokerage office in Indiana?

A. I believe not.

Q. And is there one there at the present time?

A. No; no, sir.

Q. And the forwarding of these bonds for redemption, was that just an accommodation service that the bank rendered to its customers?

Mr. Kirkpatrick:

I object to the last question, your Honor. I don't think that is a proper question. It is a [408] conclusion.

The Court:

I think that is correct. Objection sustained.

Mr. Duggan:

That is all.

The Court:

That is all, Mr. Straitiff.

Mr. Miller, Jr.:

Mr. Brubaker, will you take the stand?

THOMAS F. BRUBAKER, a witness called by defendant First National Bank in Indiana, having been duly sworn, testified as follows:

Direct Examination:

By Mr. Miller, Jr.:

Q. Where do you live, Mr. Brubaker?

A. In Indiana, Pennsylvania.

Q. And how long have you lived there?

A. Since February of 1952.

Q. What is your occupation, Mr. Brubaker?

A. I am cashier of the First National Bank in Indiana.

Q. How long have you been so employed?

A. Since January 1, 1952.

Q. Now, Mr. Brubaker, I believe you were requested by us to examine and check the books and records of the First National Bank in Indiana with particular reference as to whether you could find any notice—record of notice in the files of [409] the First National Bank in Indiana that would indicate the bonds the subject of this litigation were defective. Did you examine the files in that respect?

A. I examined the files very thoroughly.

Q. And what did you find?

A. I found no evidence of any file of these matters or that there ever was a file.

Q. Does the First National Bank in Indiana have ticker tape, Mr. Brubaker?

A. No, sir.

Mr. Miller, Jr.:

That is all. Cross examine.

Cross Examination:

By Mr. Kirkpatrick:

Q. Mr. Brubaker, when did you make your examination of the files?

A. Last week; all last week.

Q. That is, in 1954?

A. Yes, sir.

Q. And your testimony is merely that you did not find at that time in the files of the bank any notices such as Exhibit 10 or any of the other—are you familiar?—such as Exhibit 10?

A. I have never seen it.

Q. Well, let me show it to you.

Mr. Miller, Jr.:

If the Court please, on the original introduction we offered our objection to that Exhibit 10, [410] and any reference thereto is incompetent, irrelevant and immaterial.

The Court:

I so understand, Mr. Miller.

A. (After looking at Exhibit 10) To the best of my knowledge, I have never seen the exhibit.

Q. Now, you have testified that you didn't find any evidence that there ever was a file with respect to such notices. Could you explain that further for me, Mr. Brubaker?

A. When a bank receives notices such as this, pertaining to investments, it checks them to see if there are any in their own portfolio. The usual practice is to pass it around among the employees, and then the thing is dropped.

Q. You are speaking now as to your own bank?

A. I am speaking generally, I believe.

Mr. Kirkpatrick:

That is all the questions I have of the witness, your Honor.

Re-direct Examination:

By Mr. Miller, Jr.:

Q. Just one other question, Mr. Brubaker: What was your occupation prior to becoming cashier of the First National Bank in Indiana?

A. From 1947 through 1951, or to January 1, 1952, I was a national bank examiner with the Treasury Department's office of the Comptroller of the Currency.

Mr. Miller, Jr.:

I think that is all.

[411] *By Mr. Kirkpatrick:*

Q. Where did you operate, Mr. Brubaker?

A. I operated in the Fourth Federal Reserve District, which comprises western Pennsylvania, all of Ohio, and a narrow portion of West Virginia and eastern Kentucky.

Q. And had you examined this particular bank?

A. Yes, sir.

Q. When?

A. I examined it twice in 1951 that I am sure of, and I believe in nineteen forty—fifty—1950.

Mr. Kirkpatrick:

I think that is all, your Honor.

Mr. Miller:

Thank you, Mr. Brubaker.

Mr. Miller, Jr.:

Mr. D. R. Tomb I would like to recall to the stand.

D. R. TOMB recalled on behalf of defendant First National Bank in Indiana.

Mr. Kirkpatrick:

I understand the witness is now being called in the bank's own case, your Honor.

Mr. Miller, Jr.:

That is correct.

Direct Examination:

By Mr. Miller, Jr.:

Q. Mr. Tomb, I believe you gave certain testimony with reference to when you received notices of the defects or infirmities in these bonds, the subject of this litigation. Do you wish [412] to explain further with regard to your testimony as to that?

A. Well, in view of the testimony given, I wish to explain that the testimony I was giving pertained only to notice regarding the bonds involved in this case. I assumed that that was the question which was being asked—

that is, to the Home Owners' Loan bonds involved in this case.

Q. Mr. Tomb, did you have any notice of any bond—of securities' defects prior to the time of the transaction of these bonds at the First National Bank in Indiana?

A. No.

Mr. Miller, Jr.:

That is all.

Cross Examination:

By Mr. Kirkpatrick:

Q. Now, Mr. Tomb, in view of your explanation, I will ask you when you first had any notice from the bank regarding the defect in any of the bonds delivered to the bank by Mr. Parnell, concerning which the witness Straitiff testified?

Mr. Casey:

That is objected to, as not cross examination.

Mr. Kirkpatrick:

Your Honor, the witness has undertaken to explain—I have no objection to that—his prior testimony.

The Court:

That is all right.

Mr. Kirkpatrick:

But I think I am entitled now to have him speak with reference to the other bonds concerning which [413] Mr. Straitiff testified, the purpose being knowledge of the bank. The witness has offered to prove notice to the bank with respect to defects in

the Home Owners' Loan bonds. My point is that if they had notice of other bonds received from Mr. Parnell about the same time, that is a proper fact.

Mr. Casey:

If the Court please, I think that is perfectly right, if he wants to call the man as his own witness, but not on cross examination. He is only limited here to certain bonds, the subject of this litigation, and about which he testified.

The Court:

Well, he is called, as I understand it, on the question of the issue as far as the bank is concerned, whether they had good faith or not. And he having testified as to notice of two transactions, I think he can be inquired of as to notice on the third one.

Mr. Casey:

You mean as to his ability to know—

The Court:

Whether he knows or not.

Mr. Casey:

I have no objection, if he knows it.

The Court:

Whether or not he knows about that other transaction, that Mr. Parnell had testified to.

Mr. Casey:

In the first place, if his duties required him—he is a lawyer, and presumably counsel for the bank, and that is as far as I know in the case.

The Court:

I think he will understand the question all right, Mr. Casey.

[414] *Mr. Casey:*

What I am getting at, it might be he has no duty as far as notice from anybody.

The Court:

That may come out. If that is so, that will end it perhaps. But I think he is entitled to put the question. I think, though, it better be rephrased to any notice relative to bonds, or the transaction which was brought into the bank by Mr. Parnell.

Mr. Miller, Jr.:

I would like the record to show that the Bank of Indiana has no objection to that answer.

Mr. Casey:

I would like the record also to show that Mr. Miller didn't make any objection, that I made one.

The Court:

I suggested your question be rephrased. I think that it is broad, and it is objectionable on cross examination as stated. But it goes to—I think I have indicated where the error is, and I think it is proper.

Q. (Pending question read, as follows: Now, Mr. Tomb, in view of your explanation, I will ask you when you first had any notice from the bank regarding the defect in any of the bonds delivered to the bank by Mr. Parnell, concerning which the witness Straitiff testified?)

Q. Now, do you understand the question now, Mr. Tomb?

A. Yes, sir, I do understand the entire situation.

Q. Now, would you give me your answer, please?

A. That was early in 1949 with respect to the West Penn Power Company bonds, which had been—

[415] *Mr. Casey:*

Now you are getting beyond—

The Court:

I think that answers it. That answers his question.

Q. Did that matter come to your attention through Mr. Straitiff?

A. It did.

Q. Did you ask him at that time if the bank had received other bonds from Mr. Parnell?

A. I did.

Q. What did he reply?

Mr. Duggan:

Well, that is certainly objectionable, as incompetent, irrelevant and immaterial, and hearsay.

The Court:

That is right. Objection sustained.

Q. Now, as coming directly to the Home Owners' Loan Corporation bonds involved in this suit, Mr. Tomb, what is your testimony as to when you first received any notice regarding a defect in those bonds?

A. That was the testimony I gave originally. That was by your letter.

Q. That was in 1951?

A. Yes, sir.

Mr. Kirkpatrick:

That is all, your Honor.

Mr. Miller, Jr.:

May the Court please, that closes our case at this point on behalf of the First National Bank in Indiana.

[416] *The Court:*

You may be closing it forever; I don't know. All right.

DEFENDANT FIRST NATIONAL BANK IN INDIANA RESTS.

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[435] WILLIAM J. MYERS, called as a witness on behalf of the plaintiff, in rebuttal, having been duly sworn, testified as follows:

Direct Examination:

By Mr. Kirkpatrick:

Q. Will you state your full name, please, Mr. Myers?

A. William J. Myers.

Q. Where do you live, Mr. Myers?

A. At Indiana, Pennsylvania.

Q. By whom are you employed?

A. By the Federal Bureau of Investigation.

Q. How long have you been so employed in this area?

A. Nearly eight years.

Q. Were you in the year 1948 engaged in certain investigation concerning the possession and negotiation of allegedly stolen bonds?

A. I was.

Q. Did you, in the course of such investigations, have occasion to call upon Gilbert S. Parnell?

[436] A. I did.

Q. Can you tell me when you first called upon Mr. Parnell?

A. In November, 1948.

Q. Can you tell me what happened during that first call upon Mr. Parnell?

Mr. Duggan:

Just a moment. If your Honor please, I object to the form of this inquiry. This is evidently some rebuttal—

The Court:

This is rebuttal.

Mr. Duggan:

And it should be directed by specific questions, I think.

The Court:

I agree with you. The interrogation should be as to specific matters that you assume, expect to show in rebuttal.

Mr. Kirkpatrick:

I will be glad to, your Honor. I did not want to lead the witness.

The Court:

All right.

Q. At that first interview, Mr. Myers, did you inquire of Mr. Parnell concerning a $5,000 United States Treasury bond or bonds?

A. I did.

Mr. Duggan:

Just a moment. That is objected to and I ask that it be stricken, not tending to prove any issue raised by the pleadings in this case.

The Court:

I think he may be inquired of as to what [437] was the subject matter of the conversation, specifically as to what sort of securities were discussed at that first meeting.

Mr. Kirkpatrick:

It is a preliminary question, your Honor, to be followed by a second question.

The Court:

All right.

Mr. Duggan:

Nothing, in my opinion, could be relevant except the bonds that are involved in this issue.

The Court:

I understand your position. Proceed.

Mr. Kirkpatrick:

Will the reporter read the question, please?

(The question and answer were read as follows:

Q. "At that first interview, Mr. Myers, did you inquire of Mr. Parnell concerning a $5,000 United States Treasury bond or bonds?" A. "I did.")

Mr. Duggan:

That is one thing I object to, because it has no relevancy or materiality in this proceeding.

The Court:

This is rebuttal.

Mr. Duggan:

That is right.

The Court:

Overruled. Proceed.

Q. Were you interested in determining where Mr. Parnell obtained the bonds, Mr. Myers?

Mr. Casey:

That is objected to as not rebuttal.

The Court:

That is right. I agree with you. Objection sustained. I understand this witness is here to [438] rebut a time element. That is the purpose of this offer, relating to time only.

Mr. Kirkpatrick:

Time only, your Honor, and with respect to bonds obtained from this particular defendant.

The Court:

The question calls for something more. The offer was made with relation to time. I think that is what the Court has indicated is permissible. It is rebuttal at this point.

Q. Mr. Myers, did you inquire of Mr. Parnell at that time as to whether or not he had received other bonds, other than the $5,000 Treasury bonds from Mr. Rocco?

Mr. Casey:

That is objected to, if the Court please. It is not within—

The Court:

Objection sustained.

Q. Did you see Mr. Parnell shortly after November 5, 1948, Mr. Myers, in connection with this same investigation?

The Court:

Now, Mr. Kirkpatrick, I understood him to say that he saw him in November.

Mr. Kirkpatrick:

Yes.

The Court:

That is as close as he has put him. Now your question assumes that he saw him on the fifth.

Mr. Kirkpatrick:

I thought he definitely identified the date, your Honor. Perhaps I am wrong about that.

The Court:

I didn't hear the witness.

[439] *By the Court:*

Q. Did you state the date that you saw Mr. Parnell first?

A. Not as I recall.

The Court:

You put it in the month of November. Now your question assumes he saw him on a specific date.

Mr. Kirkpatrick:

I am sorry.

By Mr. Kirkpatrick:

Q. Can you tell us the specific date in November, when you first saw Mr. Parnell, Mr. Myers?

A. Yes. It was on November 5, 1948.

Q. Did you see him again shortly thereafter, in connection with the same investigation, during the month of December?

A. No, sir.

Q. Where did you see Mr. Parnell on November 5, 1948?

A. At his office in Indiana, Pennsylvania.

Q. Did you inquire of him at that time as to what, if any, bonds had been negotiated or delivered by Mr. Parnell?

Mr. Duggan:

I think that question is too general as stated. I think it ought to be in connection with the bonds that are involved in this issue, your Honor.

The Court:

I think so too. We can't have you objecting because it is both specific and general, Mr. Duggan.

I think it is relevant here on rebuttal to show whether they discussed the subject matter of the bonds, the subject [440] matter of the suit, at that time.

Proceed.

Mr. Kirkpatrick:

Your Honor, the one objection comes because I am too specific; the other because I am too general. I think I must identify what bonds—

The Court:

You inquire from this witness as to whether he discussed with Mr. Parnell the Home Owners' Loan Corporation bonds which are the subject matter of this suit.

Mr. Duggan:

That is it. That is exactly it.

Q. At the meeting on November 5, 1948, did you discuss with Mr. Parnell the Home Owners' Loan Corporation bonds which were delivered by Mr. Parnell to the bank on or about September 28, 1948?

A. No, sir; I did not.

Q. Did you later inquire of Mr. Parnell with respect to the Home Owners' Loan Corporation bonds, which were negotiated in September and October, 1948?

A. I did.

Q. Can you fix the specific date of that inquiry?

A. Yes. It was on January 8, 1949.

Q. Would you tell me what inquiries you made of Mr. Parnell, at that meeting on January 8, 1948, concerning—'49, concerning the Home Owners' Loan Corporation bonds, to which I referred?

[441] *Mr. Casey:*

If the Court please, I hesitate to say that this is without the province of the offer. The offer was made on the record, and it is pure rebuttal. I don't know what the answer might be, but it isn't within the offer. I object to it.

The Court:

As the Court understands, it is not within the offer, Mr. Kirkpatrick. I don't see its relevancy. Therefore, it is objectionable.

Objection sustained.

Q. Did you advise Mr. Parnell at the meeting on January 8, 1948, that the Home Owners' Loan Corporation were allegedly stolen bonds?

Mr. Duggan:

Just a minute. That is objected to, in the first place, because there is no evidence in this case that the bonds were actually stolen, and secondly, it doesn't rebut anything that Mr. Parnell has testified to in chief.

The Court:

That is right. It is not rebuttal. Objection sustained.

Mr. Kirkpatrick:

The witness Parnell did testify that his first notice with respect to these bonds was obtained in late January of 1949—late January or early February of 1949, when he was called down to the bank. This witness is testifying with respect to January 8, 1949.

[442] *Mr. Duggan:*

All right. It is the same month. Mr. Parnell didn't fix—

The Court:

Just a minute. But he has answered that question. Now you asked him when he first talked with him about it.

Would the reporter read the question, please?

(The question was read as follows:

"Q. Did you advise Mr. Parnell at the meeting on January 8, 1948, that the Home Owners' Loan Corporation bonds were allegedly stolen bonds?")

The Court:

It goes beyond the question of notice. It goes beyond the question of notice. This witness says that is the first time he talked to Parnell about these bonds.

Mr. Kirkpatrick:

About these specific bonds. That is correct, your Honor. The witness Parnell has testified that the first time he had any notice with respect to these specific bonds, is in late January or early February, 1949.

The Court:

That is right. This is obviously in contradiction of that.

Mr. Kirkpatrick:
That is right.

The Court:
That is all right. Let's leave it there.

Mr. Kirkpatrick:
He was not permitted to answer it.

The Court:
As to time. He has answered that as to [443] the date. I understand your question relates to what this witness told Parnell.

Mr. Kirkpatrick:
On January 8, as to whether or not these bonds were stolen bonds. And he hasn't answered that question.

The Court:
That is beyond your offer. This the point. Your offer went to the dates.

Mr. Kirkpatrick:
For the purpose of impeaching the credibility, your Honor, I must show a direct contradiction, I think, with respect—

The Court:
You have, with respect to the date. Isn't that true?

Mr. Kirkpatrick:
I think I have, but—

Mr. Duggan:
If I may suggest to your Honor, I don't think Mr. Parnell fixed any specific date in January.

The Court:

That is an argument.

Mr. Duggan:

Although the record will speak for itself, I am quite sure it doesn't.

The Court:

Proceed, if you have anything further.

Q. Did you ever talk to Mr. Paul J. Straitiff, concerning the Home Owners' Loan Corporation bonds, which were in the possession of the Bank of Indiana, on or about September 28 and October 25, 1948?

Mr. Miller, Jr.:

This is objected to as not proper rebuttal.

The Court:

I understand the purpose of the offer is [444] that he proposes to show a specific time that he had a conversation with that witness, that individual, different than what the witness testified to. The question doesn't seem to be directed to that proposition.

Mr. Kirkpatrick:

I so intended it, your Honor.

The Court:

It doesn't seem to be directed. I don't know exactly the purport of the question. I will have to sustain the objection to this particular question.

Q. Mr. Myers, can you tell me when, if at all, you first inquired of Paul J. Straitiff, concerning the obtaining of bonds from Mr. Rocco?

Mr. Casey:

That is objected to.

Mr. Miller, Jr.:

That is objected to.

The Court:

You mean from Mr. Parnell.

Mr. Miller, Jr.:

There is no testimony—

The Court:

I understand that.

You inadvertently mentioned Rocco, instead of Mr. Parnell.

The purport of the offer is, as to when he first talked with that witness, that person, with regard to these bonds, if he did talk to him. I think that is within the offer, and that is rebuttal.

Q. I will rephrase the question, Mr. Myers. When did you first talk—did you at any time talk with Mr. Paul J. Straitiff concerning the Home Owners' Loan Corporation bonds, [445] about which I have previously inquired?

A. Yes, I did.

Q. Can you fix the date of your first inquiry concerning those bonds?

A. As I recall, it was January 14, 1949.

Q. Did you inform Mr. Straitiff at that time that the bonds were alleged to have been stolen?

Mr. Miller, Jr.:

I object to that, your Honor, on the same ground we have had in the past. It is not proper rebuttal.

The Court:

I don't know that it rebuts Straitiff's testimony. My recollection is that he said whenever the F. B. I.

man talked to him was the time he first knew about it. He puts it at a different time.

Mr. Kirkpatrick:

Correct.

The Court:

I think the rebuttal evidence is terminated with the answer to the question, Mr. Kirkpatrick. I will sustain the objection.

Mr. Kirkpatrick:

If your Honor please, in connection with the offer—and I would like to refer to the transcript—you will recall that the witness Parnell and the witness Straitiff, although I do not have the testimony now with respect to the witness Straitiff, the transcript not being available, categorically testified—

Mr. Miller:

Who categorically testified, please?

[446] *Mr. Kirkpatrick:*

I am saying first that the witness Parnell categorically testified that the first notice he had of any defect in the infirmity of any bond received from the defendant Rocco was in January of 1949, and I think that I indicated in my offer that I proposed, by this witness, to contradict that statement, and to show that as early as November 5, 1948, this witness inquired of Mr. Parnell as to whether or not the treasury bond, $5,000 he was investigating at that time, had been—where it had been obtained. And I propose further to show by the witness that he inquired of Mr. Parnell as to whether or not he

had obtained other bonds from Mr. Rocco, and that the witness said that he had not received other bonds.

Now, I think it goes directly, your Honor, to the credibility, Mr. Parnell having definitely testified—

The Court:

That is not within your offer. That is the difficulty at that point.

The Court recalls Mr. Parnell's testimony and the testimony of this witness. Now the first part that is now under discussion with the Court has been covered by this testimony. We have permitted these answers. You have discussed the matter of the treasury bonds with Parnell on November 5, and he says he didn't talk with him about the Home Owners' Loan bonds at that time. You have covered that point.

[447] Now what is it you propose to show?

Mr. Kirkpatrick:

The only additional question, as I explained earlier, your Honor—that question was a preliminary question. The next question was, "Did you ask Mr. Parnell, at the November 5 meeting, if he had obtained other bonds from Mr. Rocco." And he replied, "No."

The Court:

The difficulty with this present position there is this: Mr. Parnell hasn't said that he didn't talk to the F. B. I. agent about any bonds, about Home Owners' Loan bonds, or denied receiving them from Mr. Rocco. This witness, therefore, is precluded. This isn't rebuttal. It doesn't rebut.

This should be strictly rebuttal testimony.

Mr. Kirkpatrick:

On rebuttal, your Honor, am I not permitted—

The Court:

We are talking about a collateral matter. We are talking about notice after the event that is the subject of the lawsuit. There comes a point in these things where you stop.

The only point, members of the jury, in this testimony, in rebuttal, as to this, is to affect the credibility of various witnesses that have been mentioned, as to different times that they stated. It isn't substantive evidence as to these transactions. It is after the time mentioned here alleged, and so forth.

[448] We have to stop some place. I think it is well to stop here now, on this line of examination, because it doesn't appear to be rebuttal to the Court.

Does the Court understand that you have completed matters which you had indicated in your offer, Mr. Kirkpatrick, with this witness? I don't want to shut you off if you have anything more. But if the matters indicated in the offer have been completed, I suggest we get on with the case.

Mr. Kirkpatrick:

Of course, we will try to follow your Honor's ruling exactly. My only point is, and I perhaps am confused in it, is that the issue in this case is one of notice, the defense is one of good faith, that these bonds were taken without any notice of any defect or infirmity in the title.

Now, the witness Straitiff testified, categorically this morning, the witness Parnell testified as to which I will be glad to refer to the transcript, that they

had no notice of any defect or infirmity with respect to any bonds.

The Court:

Parnell said that.

Mr. Kirkpatrick:

Mr. Parnell said that very clearly.

The Court:

You have shown by this witness a particular date.

Mr. Kirkpatrick:

On that particular one he did. The only thing I haven't been permitted to show, your Honor, is [449] that that particular bond was also a bond which was delivered to Mr. Parnell by Mr. Rocco, and which went—

The Court:

That didn't come from this witness.

Mr. Kirkpatrick:

Yes, your Honor. As I have indicated, my question was a preliminary one for the purpose of asking him—

The Court:

Will he fix that time with regard to that proposition in November?

Mr. Kirkpatrick:

My understanding is that he will, that in November he asked Mr. Parnell.

The Court:

I understood from this witness now—not to prolong it, I understood from the witness he didn't talk

to him about the Home Owner Corporation bonds in November, until January.

Mr. Kirkpatrick:

That is correct.

The Court:

He doesn't contradict anybody in January. If he says January, it might be before that.

Mr. Kirkpatrick:

May I offer the evidence then, as additional evidence in our case, apart from the—

The Court:

That is so collateral, away beyond the time. I don't see that it is important. It isn't rebuttal of anything that has been said, when you take it into January.

Mr. Kirkpatrick:

It is in November, your Honor.

The Court:

The witness you are offering doesn't [450] put it in November.

Mr. Kirkpatrick:

My witness does put in November an inquiry and a statement to the witness Parnell, that the treasury bond had been stolen, that he informed Mr. Parnell of that, and that he inquired of Mr. Parnell, when Mr. Parnell told him it had been obtained from Rocco, as to whether or not he had obtained additional bonds from Mr. Rocco, that the witness Parnell said that he hadn't.

Mr. Casey:

If the Court please, I am going to put on this record—

The Court:

All right. I will rule that out for this reason, that it is not rebuttal. That part hasn't been denied —that is the point of it—by Mr. Parnell. That hasn't been denied, so it is not rebuttal. That is the point of it.

Mr. Kirkpatrick:

Very well, your Honor. You have ruled, and I will not press the matter further.

The Court:

Let's leave it there.

Mr. Kirkpatrick:

I have no further questions of the witness, your Honor.

Mr. Duggan:

We have no questions at this time.

Mr. Miller, Jr.:

No questions.

The Court:

Mr. Casey?

Mr. Casey:

No questions.

[451] *The Court:*

That is all.

Mr. Kirkpatrick:

If your Honor please, if we may come to side bar, I would like to renew the offer which I made earlier, when the witness Straitiff was on the stand.

Your Honor, as I understood at the noon recess, had not ruled on that matter.

The Court:

As to a judgment, you mean?

Mr. Kirkpatrick:

Yes.

The Court:

If I understand it correctly, you are going to identify it and then offer that record. If you offer a felony, I think that is admissible, to attack his credibility.

Mr. Miller, Jr.:

I would like to inquire, if the Court please, if he is calling Mr. Straitiff on examination—

The Court:

I don't understand he is calling Mr. Straitiff.

Mr. Miller, Jr.:

I thought he said just now he was calling him.

The Court:

Did you say that?

Mr. Kirkpatrick:

I thought from the remark your Honor made, and the ruling which was made, that I should have been permitted, perhaps, to offer, to make my offer, or to introduce the proceedings, during the course of cross examination. I am merely asking whether or not the Court—

[452] *The Court:*

No. I think the position of the Court is, at that

time—at that time, you didn't present to the Court the record, exactly what you were going to prove, you didn't have the indictment in front of you.

Mr. Kirkpatrick:

That is correct.

The Court:

You weren't prepared to identify the matter in case the man denied it. And for various reasons it seemed to me at that time that the proper and best way to do it would be to offer the record in rebuttal. The total record. Now, if you care to do that, I will accept that, providing it is properly identified, and that the defendant therein mentioned is properly identified as being the same person, in the regular way.

Mr. Miller, Jr.:

We will admit it is the same person, and object to it as incompetent, irrelevant and immaterial.

Mr. Kirkpatrick:

I didn't understand you, Mr. Miller. You admit the same purpose?

Mr. Miller, Jr.:

I didn't say anything about the purpose.

I said we will admit the identity of the parties.

Mr. Duggan:

So far as that is concerned, if it is otherwise relevant, competent and material, I would take the same position. But, your Honor, may I just call your attention for a moment, just to one salient feature that is lacking in this offer. It is not a material matter.

It has nothing to do with the bonds mentioned in Paragraphs [453] 7 and 11 of the complaint, and it is therefore at the most, so—it doesn't contradict or affect in any manner any testimony given in connection with the negotiations.

The Court:

That is an argument.

Mr. Kirkpatrick:

That is a speech.

The Court:

That doesn't go to the question of admissibility. It is a question here of whether or not it is permitted, to affect any one. That objection is overruled.

Mr. Miller, Jr.:

Do I understand in offering the whole record that I will have the opportunity to comment on the opinion of the Court?

The Court:

We are going here step by step. I have only ruled—you make your offer now.

Make your offer now, Mr. Kirkpatrick, and we will rule on it, and everyone is protected.

Mr. Kirkpatrick:

The identity of the defendant having been admitted, your Honor, I now offer in evidence for the purpose of impeaching the credibility of the witness Straitiff, the indictment in the case of *United States of America versus Paul Jones Straitiff*, 13723 Criminal, in the United States District Court for the Western District of Pennsylvania. Also, the pleas

which are endorsed upon the indictment, namely, a plea of not guilty on December 3, 1952, and a plea of guilty entered on December 3, 1952, to [454] counts 1, 2, and 3. And also the judgment and sentence of the Court in that proceeding, the official documents having been at my request brought to the court by the clerk.

The Court:

Now, at this point, is there any question about the record which is offered, that being the record?

Mr. Duggan:

I will not raise that question. I think not, your Honor. I would say I don't voice any—

The Court:

Otherwise we will swear the clerk. That is the point.

Mr. Duggan:

No, sir. I am perfectly satisfied.

The Court:

It is stipulated among all counsel then, that that is the record. I wish to have you point out to the Court, Mr. Kirkpatrick, those counts in the indictment that are designated a felony.

Mr. Kirkpatrick:

The counts in the indictment, your Honor, which are designated as felonies, and upon which a plea of guilty was entered, are all the counts upon which the plea of guilty was entered; namely, guilty on counts 1, 2 and 3.

Did I understand your Honor also wished me to refer to the statute defining that as a felony?

The Court:

Is there any question about those being felony counts?

Mr. Miller, Jr.:

No. No question.

The Court:

We will shorten that.

[455] It is admitted for the purpose stated, the purpose offered, judgment of conviction, including those counts in the indictment which allege a felony; and the plea and the fact that he was sentenced. We will not admit the duration of the sentence. He was sentenced by the Court. The record shows that he was sentenced. Is that correct?

Mr. Kirkpatrick:

Yes, the record shows that.

Mr. Duggan:

And your Honor, will it be further conceded by the plaintiff that the counts that are mentioned in the indictment, the first three counts, as I gather it, had nothing whatever to do—

The Court:

If you care to, that can be read to the jury now or any other time. Is there any question about that? You can read those counts and the dates on which the offenses were alleged to have taken place.

Mr. Duggan:

If I could get an admission that they had nothing to do with the bonds mentioned in this proceeding, that is all I ask for. If they will admit that—

The Court:

It is in another matter.

Mr. Kirkpatrick:

It is in another matter, your Honor, yes.

Mr. Miller, Jr.:

I wanted to ask one thing, as to the specific portions of the witness' testimony which this is offered to impeach.

Mr. Kirkpatrick:

It is offered to impeach his [456] credibility generally, your Honor.

The Court:

I think he has made his offer.

The record is now that there is no question about the authenticity of the evidence offered by Mr. Kirkpatrick. That is the record, nor the identity of the witness—

Mr. Miller, Jr.:

That is right.

The Court:

Paul J. Straitiff, as being the defendant therein named.

Mr. Miller, Jr.:

Do I understand the Court that I would be in order now to make my offer with regard to the statements of opinion of Judge Martin sitting?

The Court:

No. I think we will take that up at the conclusion of the rebuttal.

Mr. Miller:

If I may. That is perfectly all right.

The Court:

I want to make it clear to the jury at this time, I have received in evidence here a record of conviction of that witness, Paul J. Straitiff, and that is here for one purpose only, as I will charge you further, at some later time, to affect his credibility as to what he said. It is not to prove any specific offense, or any charge in this case at all.

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[457] ARTHUR ANTHONY ROCCO, a defendant, called by the plaintiff in rebuttal, having been previously sworn, testified as follows:

Direct Examination:

By Mr. Kirkpatrick:

• • •

[461] Q. Did you go with him (Mr. Parnell) to the bank when these two checks, Exhibits 15 and 18, which relate to the Home Owners' Loan Corporation bonds, were cashed?

A. Why, I don't think I've been in the First National Bank more than once in my life, and that was some years before that. I never was in the First National Bank.

Q. Where—

[462] *Mr. Duggan:*

Would you keep your voice up please, Mr. Rocco, so we can hear you back here?

Q. Where were the payments made to Mr. Parnell?

A. I would have no idea where the payments were made to Mr. Parnell. I was paid in Mr. Parnell's office.

• • •

[463] *Mr. Kirkpatrick:*

I think that is all the rebuttal the plaintiff has, your Honor.

The Court:

Any surrebuttal?

Mr. Miller, Jr.:

May the Court please—

The Court:

We will start first with Mr. Casey. Any surrebuttal?

Mr. Casey:

I have no surrebuttal, if your Honor please.

The Court:

Mr. Duggan?

Mr. Duggan:

Would you give me just a moment, if your Honor please?

I have no surrebuttal.

The Court:

All right. Mr. Miller?

Mr. Miller, Jr.:

I have only one matter. I wish to offer and call to the Court's attention and have read here, the certain portions of the Court's opinion, stated by Judge Martin, in the case in this court, the record of which has been previously offered, and to read those portions which pertain to the witness Straitiff's honesty and integritp, believability. I make that particularly with reference to rebuttal.

The Court:

I didn't permit the sentence. I don't think the sentence is part of the record for the purpose offered, as you will recall. I think the matter is closed [464] with the admission into evidence of the judgment of conviction. It affects his credibility as such. Now we won't go back into the comments of the Court. That leads to many ramifications, what the Court said at the time of the sentence—you would get into what he said, what counsel said. We would retry that case.

Mr. Miller, Jr.:

I felt that the comments of the Court were particularly relevant in this case, and I wish to have it offered.

The Court:

The fact remains he was convicted. That is the purpose of the offer, to affect his credibility. So therefore, your offer is refused.

I understand now the case is closed. Is that right?

Anything further?

Mr. Miller:

Just one moment, if your Honor please.

Mr. Duggan:

Since the testimony has closed, I would like to make a motion that the Court enter an order of involuntary dismissal against the plaintiff with prejudice, for the following reasons—

Mr. Kirkpatrick:

If this is to be an argument, your Honor—

Mr. Duggan:

I am just making the motion. I am not going to argue this at all, until the Court wants to hear me.

First, there has been no evidence of actual notice produced by the plaintiff in connection with the negotiation [465] of the Home Owners' Loan bonds mentioned in Paragraphs 7 and 11 of the complaint, which of course are the only bonds in issue in this proceeding, and on which the Court is now called upon to pass.

Secondly, that there is no evidence of any bad faith shown on the part of the defendant, Gilbert S. Parnell, or any evidence of any circumstances that might put him on reasonable inquiry as to the source of the title, to the bonds in question.

Third, that in view of the matters stated in the foregoing reasons, the plaintiff has not met the burden of proof that is cast upon it under the laws and the rules of evidence.

And in the absence of any proof, such as I have heretofore suggested, I believe it is within the province of this Court to enter the involuntary order of dismissal with prejudice, as I have just suggested.

The Court:

I take it your motion is a motion for directed verdict at the close of all the evidence?

Mr. Duggan:

That is right.

The Court:

A decision on that motion is reserved, so that this matter may be reviewed at the proper time.

Mr. Casey:

I would ask leave to file the federal equivalent of the point for binding instructions under the rule, in writing, asking for a directed verdict.

[466] *The Court:*

You may do that at any time. You may do that.

Mr. Miller, Jr.:

If the Court please, I have certain points for charge that I would like to submit to the Court, and also I would ask to be heard on our first point for charge; that is the point for binding instructions, if I may, please, before the matter closes.

The Court:

We will hear you.

• • •

[468] *Mr. Miller, Jr.:*

Before the record is closed—

The Court:

There is no closing of this record. Court is not recessed.

Mr. Miller, Jr.:

I just wanted to make my motion for a directed verdict. I don't believe I mentioned that, as I handed the points in to you.

The Court:

You have a separate motion.

Mr. Miller, Jr.:

I think it comes under the heading of the first point for charge, as to a directed verdict.

• • •

[472] *Mr. Miller, Jr.:*

I am not sure when my time comes for stating reasons. I would like to state summarily our reasons for asking for a motion for binding instructions.

The Court:

Under Rule 50. State those at this time, Mr. Miller.

Mr. Miller, Jr.:

The first is the fact that the law is that the burden is on the plaintiff, under the cases cited to the Court, to prove notice.

The second is the point under that, that public policy in the case of banks demands that. In this case, there is no record, no proof of any kind whatsoever throughout, that the bank had any notice of any defect or infirmity [473] in the bonds or any participation in fraud or misrepresentation prior to or at the time that these bonds were handled through the bank.

Third, as a matter of persuasive force, particular persuasive force, is the fact that a national bank, member of a federal reserve system, would be subject to severe criticism if it refused to handle the bonds in exactly the manner which it was proved here they were handled, and the manner which is, I think, undoubtedly the proper manner for handling them.

Fourth, the matter of a certain showing of possibility of want of due care on the part of the plaintiff, in their handling the bonds originally, at the inception of the case. This falls under the principle referred to in the cases, that where one of two innocent parties must suffer, the one who puts it within the power of a third party to commit a wrongful act must bear the loss. I think the evidence is conclusive in regard to that also.

Controlling on that point is the fact that I think in this case, in the case of United States Governmen bonds, bearer bonds, the rules and regulations of the United States Government apply and control in the case.

While this doesn't constitute an elaboration, I think this sums up our principal reasons for our position in the matter with reference to the fact that the case [474] should not go to the jury, that there is no evidence whatsoever of any wrongdoing on the part of the defendant First National Bank in Indiana, and affirmative evidence, uncontested, of a proper method of procedure.

The Court:

Those reasons are in support of your motion.

Mr. Miller:

That is correct.

The Court:

For a directed verdict under Rule 50.

* * *

[486] *Mr. Duggan:*

Your Honor, is it your position that the burden in this case is on the plaintiff, as it always is, not only to prove—

The Court:

Will you just listen to this, Mr. Duggan? This is Mr. Justice Stern. This is the Chief Justice. It was written in '41, when he was right at the height of his mental power. This is a case where a lawyer put the bonds in the hands of a New York house, through a crook, and he said:

[487] It was incumbent upon plaintiff to prove only its ownership and loss of the bonds, and the burden would then have shifted to defendants to show that they came into possession of the securities under such circumstances as to relieve them from liability for a conversion.

Mr. Duggan:

That is what the Goldberg case says, but your Honor is following—

The Court:

Is that or is that not the law?

Mr. Duggan:

No, sir, not in this case. Your Honor is following the federal rule.

The Court:

There is no difference in the federal rule and the state rule on that point.

That is the only position I take different from you people. It is just a question of who has to come forward and show good faith once they have shown they were stolen.

Had they been purchased for investment, for this bank's portfolio, then I would have agreed with you.

Mr. Miller, Jr.:

Our position is that it is on them to show that they weren't purchased. All we have is—

The Court:

They do that.

Mr. Miller:

We don't know they weren't purchased.

The Court:

You know you didn't purchase them. Your answer shows you didn't purchase them. It is not in dispute that they were sent in for redemption. That throws the burden on you.

[488] *Mr. Miller:*

I don't think you can presume bad faith.

The Court:

That is right.

Mr. Miller, Sr.:

Is there a difference where bonds—

The Court:

There is no presumption any way. There is no

presumption either way, as I read the cases, of bad faith. All you have to do is explain, exculpate yourselves.

Mr. Miller, Sr.:

That is right.

The Court:

Show your honest dealings. That is all there is to it. It is as simple as all that.

Mr. Miller, Sr.:

What I have in mind, is there any difference between a case where bonds float over the country for four years without any explanation or disposition of what became of them, until they land up in Indiana—does that make it any different than just having bonds now and within a short period of time being discovered and turned up? It seems to me that might make considerable difference in the burden of proof.

I am just making that suggestion. I don't care to suggest you change your mind.

The Court:

I don't see that it does. I have looked at every one of those cases. I have been particularly worried about this burden of proof. I don't mind telling you, because I think that is the only point in the case [489] where we might be in error, on that charge. I am satisfied we have to go by what these decisions are here, on that point.

Mr. Miller, Jr.:

Our position on that point is on the three United States decisions with regard to government bonds,

which I cited previously, the *Morgan vs. United States,* and more particularly *Murray vs. Lardner* and *Hotchkiss vs. National Bank.* In both cases they say the burden is on the plaintiff.

The Court:

Those were purchased. Those were not bonds that were sent in for collection.

Mr. Miller, Jr.:

Our position is even better in a case of being merely an agent for collection than it is on a purchase. In other words, we chose that method to rely, as agent—we sent them to the Federal Reserve Bank and said, "You be the judge on this thing, and we will remit the funds if you say it is all right." Our position is even enhanced by the fact we did that, rather than the other. As I understand it, then, I don't think our burden of proof should be any heavier.

The Court:

All you have to do is convince that jury—

Mr. Miller, Jr.:

I realize your other position, under the charge.

* * *

[492] *Mr. Miller, Jr.:*

I am wondering if you are going to rule on our points for charge.

The Court:

I intended to. I overlooked them.

No. 1, your point for binding instructions is refused. You have a motion.

I will have to refuse No. 2. That refers to the burden of proof.

Mr. Miller, on No. 3, I am going to use excerpts of that case, the case at 296, 27, but I don't think you have copied that exactly.

Mr. Miller:

I haven't—

The Court:

That is a hard case to read, I grant you, but I don't think it says quite that. I don't read it the same way you do.

Mr. Miller, Jr.:

That was what we found.

The Court:

"Plaintiff must show actual notice or knowledge of a defect or infirmity to the title of the bonds—" In that case, they are talking about where the person has the bonds for value. That is certainly in that case. When that is the situation, a holder in due course for value, then it is certainly in the law. Then the plaintiff has the burden of assailing the title all the way [493] through. Until he does that, you don't have to say a word. I think that is what that case holds.

I think that is the position you have taken, and that is consistent with your position. It is consistent with your position. I am in disagreement with it. Therefore, No. 3 will have to be refused.

No. 4: Unless you find as a fact that the defendant, First National Bank in Indiana, had actual notice or knowledge of a defect or infirmity in

the title to the bonds in question at the time they were delivered to it for redemption, your verdict must be for said defendant, First National Bank in Indiana.

That will be refused.

No. 5: You are also instructed that the stipulation made by counsel as to what the representative of the Federal Bureau of Investigation would testify to and was placed on the record in this case, is insufficient to charge the defendant, First National Bank in Indiana, with notice of defect or infirmity of the Home Owners' bonds in question in this case.

That calls for a charge that that is insufficient as a matter of law. It precludes it entirely.

Mr. Miller:

It is in a sense asking the jury to disregard it.

The Court:

The Court's instruction will be that that is one item of proof on that subject. They are to consider that as well as all the rest of it, in deciding
[494] this question of good faith. If they believe the witnesses, that it was not received, it has no effect whatsoever.

Mr. Duggan:

Your Honor, in connection with the holder for value in due course, have you given this any consideration? When Parnell took these bonds for redemption, he was simply an agent. When the bank took them, they had no title except taking them as an agent for redemption. But when that money came

back to the bank and it paid it over to Parnell, the proceeds from the sale, then from that time on the bank became the holder for value in due course. And when Parnell paid Rocco, in the absence of anything to the contrary, he became a holder in due course.

That is under the *McKinley* case, that I think you will find in the brief.

The Court:

I don't see that that is under the definition of a holder in due course, as I understand it, especially when they pay him that amount of cash. Remember that cash? I'm from the country, too. I don't hand around $19,000 in cash.

Mr. Miller, Jr.:

As far as the bank was concerned, it was payment by check. The fact that he went over to a teller and got a check cashed is an entirely separate matter. That is at the other end of the bank.

The Court:

Are you telling me that or are you going to tell the jury that?

[495] *Mr. Miller, Jr.:*

The evidence is that the bank paid by check.

The Court:

It is all for the jury.

Mr. Kirkpatrick:

I understand No. 5 will be refused.

The Court:

Yes, but I will cover that. I am going to refuse that. If you want to submit a further point—

No. 6: You have heard the testimony in this case in behalf of plaintiff that it was the owner and in possession of the bonds in question on May 2, 1944 and how, by the testimony of the young lady, Miss Britton, they disappeared from plaintiff bank's possession. If now you find that as a fact defendant, First National Bank in Indiana, Pa. committed no wrong in having the bond redeemed, then as between plaintiff and defendant bank your verdict must be in favor of said defendant bank, First National Bank in Indiana, Pa. for the reason that as between plaintiff and said defendant the one whose conduct made the loss possible must stand the loss.

I think that last part is superfluous. You don't have to say what the rule of law is, because you can stop right there. If you just switch that and say your defendant bank was not in bad faith in having the bonds redeemed, I will affirm that.

Mr. Miller, Jr.:

We add that particularly because of the holding in the Goldberg case.

The Court:

That is a conclusion, but you don't have to state the reason. You don't have to say, "Let the
[496] other man share." If you committed no wrong, you are just not to be held. That is right.

Mr. Miller, Sr.:

I thought it might be better to have it before the Court as to what our position was.

The Court:

It injects something here that we haven't talked about before the jury.

Mr. Miller, Sr.:

If you want to cut the last part, all right.

The Court:

That question of no wrong—I think it had better be stated, "acted in good faith." I would approve it if it were stated, "acted in good faith." The courts all use those two words.

Anything else, gentlemen?

Mr. Kirkpatrick:

On that, your Honor, if they wish to revise that and take out the words, "committed no wrong," and say "acted in good faith," we will not object. I am afraid "committed no wrong" is going to be confusing.

The Court:

That is different terminology than the cases use. Justice Stern said in this case, "with negotiable instrument the test is not care but good faith."

Mr. Miller:

It is the same thing.

The Court:

But they use that phrase and I want to stick to that.

I want you to come up at the close of the case, if I haven't covered these specific matters, and call it to [497] my attention. It is no indication that my feelings are going to be hurt, because I have overlooked something. Come up and say what you want

to have done, and I will do it. If I have overlooked it, I will do it.

I guess we have all put in a hard day. I have another case at four o'clock.

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[498] MORNING SESSION

Friday, October 15, 1954
10:00 A. M.

The Court:

Gentlemen, will you come to side bar a moment? I want to inform you of the ruling on requests.

(At side bar.)

The Court:

I think the record is clear on the motions for directed verdict. They have been filed now in writing and refused in all instances. We don't need to take up that matter any further.

Does Mr. Rocco have any written points for charge?

Mr. Casey:

No. Except the directed verdict.

The Court:

The motion?

Mr. Casey:

Yes, sir.

The Court:

Mr. Duggan has submitted two points for charge on behalf of Mr. Parnell, both of which will be refused.

The points on behalf of the First National Bank of Indiana, that were submitted yesterday afternoon, some six in number, are refused. That defendant has submitted additional points this morning six, seven and eight. Number six will be affirmed. Number seven will be affirmed. And number eight is refused.

That brings us down to plaintiff's requests.

Number 1 is refused, because the Court believes that the question of oral testimony always raises a question for the [499] jury.

Numbers two and three are refused. Numbers four and five are affirmed.

Number six is refused because the matter will have been covered, and I regard it as repetition.

However, Number 7, I expect to cover, but nevertheless plaintiff may be entitled to have it stated in the way he desires it, so I am going to affirm Number seven.

I refuse Number eight, as that will be covered in the charge. I will affirm Numbers nine, ten and eleven.

Number twelve is refused, because that amounts to an instruction as a matter of law, that they are entitled to six per cent. And I don't think it is necessarily a fact. They have to find the amount. They might want to bring in a verdict here—I am going to leave it to them whether they want to find three or six per cent.

Mr. Kirkpatrick:

I didn't know how you expected to handle it. Does your Honor expect to give them six verdict slips, or—

The Court:

No. I expect to give them three verdict slips on which they will either find for the plaintiff or defendant as to each individual. They will all have the same number.

Where are the verdict slips?

They will put the amount in each one.

[500] Assuming, of course, I am going to tell them that if they find against all, the amounts will be the same.

Mr. Duggan:

Your Honor, there are just two matters I want to ask. I understand you to say you affirmed bank's points 4, 5, 7, 9, 10 and 11?

The Court:

4, 5, 7, 9, 10, and 11.

Mr. Duggan:

There is just one other little matter. I made my motion for directed verdict orally at the close of the testimony yesterday. May I have the opportunity of submitting it in writing?

The Court:

That has been understood that you may submit that in writing at any time.

Mr. Kirkpatrick:

Is it understood that we automatically have an exception to the points refused?

The Court:

All parties have an exception to the refusal to charge.

* * *

Copy of Order of Dismissal of Federal Reserve Bank of Cleveland.

AND NOW, this 13th day of October, 1954, plaintiff having completed the presentation of its evidence, and the defendant Federal Reserve Bank of Cleveland having moved for a dismissal on the ground that, upon the facts and the law, plaintiff has shown no right to relief, and the Court having given due consideration to the evidence presented by the plaintiff, and to the law applicable thereto,

IT IS ORDERED, that the motion be, and the same hereby is, granted, and the action is dismissed as to said defendant.

/s/ JOSEPH P. WILLSON,
D. J.

Motion for Directed Verdict.

AND NOW, to-wit, this 15th day of October, 1954, all the evidence having concluded, First National Bank in Indiana by its counsel, Miller & Miller, moves the Court to direct a verdict in favor of defendant, First National Bank in Indiana based on legal grounds heretofore specifically stated.

MILLER & MILLER,

By HARVEY A. MILLER, JR.,
Attorneys for First National Bank in Indiana.

Oral Charge of the Court.

WILLSON, JR.

Now, members of the jury, there is one final speaker in this matter and then you are going to have this for decision. We have been here, and this is the fifth day, and I am confident that the jury has the facts firmly in hand, that you yourselves recall the testimony. After all, you have patiently listened to the evidence as it has unfolded before you. And you will now give your attention to what I have to say as to what the law is.

Of course you have been trying this case, Civil Action No. 9386, in which the plaintiff is the Bank of America National Trust and Savings Association and the defendants are, first Arthur A. Rocco, second Gilbert S. Parnell, third First National Bank in Indiana; and you recall, of course, at the outset of the case the Federal Reserve Bank of Cleveland was in the case.

Now, the Court relieved Federal Reserve Bank from liability under the evidence presented, on the motion of that bank, because the Court felt that under the law that bank was not liable. Now, the fact that the Court has done that in this case means, as I mentioned before, absolutely [558] zero so far as your consideration of the facts in the case as they relate to the plaintiff and to the three remaining defendants. In other words, I think the jury has that in mind, that there is no inference or implication to be drawn one way or the other from the fact that the Federal Reserve Bank has been discharged.

Now, of course, members of the jury, you and I in the performance of our sworn duties here have no interest

whatsoever in the outcome of this lawsuit. You are sworn, as I am, to try the case in a fair and impartial manner. That means that merely because the plaintiff is a big bank, we will say, and one of the defendants is a relatively small bank, that has no bearing on the facts, and you shouldn't decide the fact. You have no sympathy for or against any one of the individual defendants. They may suffer, somebody may, because of the way the case is going to be decided by you; but that doesn't enter into the matter of your deliberation and how you find the facts. You find on the evidence that has been brought out in this courtroom and upon the Court's instruction—the summation by the attorneys—the attorneys have a perfect right and it is their duty to sum the case up on behalf of each of their clients, it is their duty then to attempt to persuade you to accept the facts as they see them. I have no such duty whatsoever, I have no interest in it. I am just going to tell you what I [559] consider the law to be, and you will accept the law from me. Nothing that I say shall influence you in the facts of the case. You are the sole judges of the facts. You find the facts on the evidence. And nothing that I say should influence you as to the findings of fact, your duty in the case. The duties of the jury and jury are separate and distinct.

Now, of course, in this case, as in all other cases, there are certain fundamental matters that you want to have in mind, and I wish to instruct you on them.

Do you hear me all right, members of the jury? Does number twelve juror hear me? Because if I don't speak loud enough, just tell me, because the acoustics here are bad, and we recognize that.

In your deliberation and arriving at a verdict you will bear in mind that in an action of this kind the plaintiff has the burden of establishing his case by a preponderance of the evidence. In considering this case, you will examine all of the material evidence in order to determine its relevancy and the true state of facts. You will weigh all of the evidence in the case so as to reconcile, if possible, such evidence as may have a seeming or apparent conflict. And in considering and weighing the evidence you should use the same judgment, reason, common sense and general knowledge of men and affairs as you would in every- [560] day life.

In mentioning the burden of proof I have referred to the requirement of the preponderance of the evidence. This is a term which you no doubt will readily understand. It has been defined as that evidence which, after consideration of all of the evidence, is in the judgment of the jury entitled to greater weight. Or stated in another way, the phrase "preponderance of evidence" means that the evidence which points to a certain conclusion appears to the jury to be more credible and probable than the evidence to the contrary. It means such evidence as, when weighed with that which opposes it, has the more convincing force and from which it results that the greater probability is in favor of the party upon whom the burden rests. The weight of the evidence, in other words—that the weight of the evidence is in favor of one matter. That is for you to judge. When you find the weight of the evidence favors the fact under discussion, under deliberation, then you should follow that fundamental proposition and find accordingly.

Now, another matter in which the jury are the sole judges, and that is as to the credibility of the witnesses. That is, the credibility that now we are talking about—another synonym, another word for "credibility", is perhaps "believability". Which witnesses, what testimony, do you believe? Now, the credibility of the witnesses, of course, [561] is for you. With that the Court has nothing to do. You may judge the credibility of a witness by the manner in which he gives his testimony, his demeanor on the stand, the reasonableness or the unreasonableness of his testimony, his means of knowledge as to any fact about which he testifies, his interest in the case, the feeling he may have for or against any of the parties, any other party in the case, or any circumstances tending to shed light upon the truth or falsity of such testimony. And it is for you to say what weight you will give to the testimony of any and all of the witnesses.

If you believe that any witness has wilfully sworn falsely to any material fact in this case, or in any matter which he has testified to, you are at liberty to disbelieve the testimony of that witness in whole or in part, or believe it in part and disbelieve it in part, taking into consideration all the facts and circumstances in the case.

Now, in this case particularly the instruction on credibility should be kept in mind because, as the Court sees it —and this is for you—the physical facts in the case, that is, what was actually done, what was handed to him, what was the subject of the conversation, and the manner in which these transactions were carried on, there is not too much material dispute. But the motives of the people in the case, and as testified to from the stand, are [562] subject to the interpretation by the jury. You are to find

here—your duty is to find who was telling the truth, who was giving the correct situation as to what took place, who was telling the true and honest story.

And in that connection, and in that connection only, the testimony—or the evidence as to the conviction of the one witness is merely in the case to test, to affect his credibility and veracity. In judging what he has to say, of course you balance against that the fact of this conviction. You may conclude that he is telling the truth. The conviction is not conclusive whatsoever. It may have no weight whatsoever in your minds. You give it what weight you think it deserves.

Now, in the case, ladies and gentlemen, the plaintiff has offered proof, of course, it owned this series of bonds.—And I am not going to discuss it—Home Owners' Loan Corporation bonds in a total amount of $57,600. Now, of course, you must find under the evidence—and this evidence is for you—that the plaintiff was the owner of these bonds, and that the bonds disappeared, that is, that the plaintiff lost possession and ownership—in other words, it was deprived of property in some manner. Because if the plaintiff—you can readily see, if the plaintiff didn't lose anything he is not entitled to recover, that plaintiff is not entitled to recover in this case.

[563] So your first issue then is to find whether or not the plaintiff owned the securities in question and whether or not these securities were unlawfully taken from his possession, as it alleges and has attempted to show here. And you don't just wilfully disregard matters that are not in dispute, but you weigh them, give them such credence as you think the testimony as a whole deserves, under the instructions of the Court. Now, you don't have to find

for instance, that any one person in this—any one person anywhere—was the person who possibly purloined or stole these bonds from this bank. But if those bonds were unlawfully taken from the possession of the bank, and had been owned by the bank, then we come down to the point in the case it happened in Pennsylvania and the jurisdiction of this court, what we really have under discussion here, as to the liability, if any, of these parties, the defendants in this case, to this plaintiff.

We are talking then about what are commonly known as negotiable instruments. The general definition of a negotiable instrument is: An obligation for the payment of money, with the amount expressed on its face, which may be transferred from person to person without formal assignment, but by mere endorsement and delivery by the holder, or by delivery only if it is a bearer instrument. I think that has been mentioned, and I think correctly so, by the various [564] attorneys here, if payable to bearer it ordinarily passes by delivery, the same as currency, the same as a dollar bill, the same as a Government bond, payable to bearer. And in that connection I notice that the bond on the face of it says: "Home Owners' Loan Corporation and the United States of America are indebted to the bearer." That is on the face of the bond, and coupons accordingly—"Home Owners' Loan Corporation will pay to bearer." So that this is a bearer instrument, as the evidence shows. So it amounts to this, the law as to bearer instruments applies to the case.

Now, other words have been used which I want to define.

In the law of negotiable instruments the term "negotiation" is frequently used. It has been used in this case.

It is said that an instrument is negotiated when it is transferred from one person to another in such a manner as to constitute the transferee the holder. It is payable to order, it is negotiated by the endorsement of the holder plus delivery. Well now, if it is payable to order, of course that is not our case. But for illustrative purposes, a check that is ordinarily "Pay to John Doe," we will say, "or order," he transfers that by endorsement. That is an order, you see. But this bond, as money, again, is transferred by delivery merely.

[565] Now, it has been alleged here that these defendants—the three defendants now, of course, I am talking about only, when I am talking about the defendants—have converted these bonds. Well, "conversion" is a familiar term—perhaps not so to lay people. But a general definition of "conversion" is: An unauthorized exercise and dominion over goods or personal chattels belonging to another amounting to the exclusion of the owner's rights or depriving the owner's rights therein. In other words, the taking of property that doesn't belong to you and depriving the owner of that property, that is conversion.

Now, in this case, for illustrative purposes only, two defendants at least, Mr. Parnell and the bank, don't claim, as I understand it—as the Court understands from the evidence, but you have to find it, you find the facts—but it seemed undisputed here and it is the theory of all persons concerned, that they don't claim as owners, they didn't claim at any time to be owners, they acted merely as agents for the purpose of securing redemption. You recall the testimony that the bonds were called as of May 1, 1944, by the Home Owners' Loan Corporation. Had they not

been called at any time, they would have been payable in 1952. So that Mr. Parnell and the bank were acting for the purpose of collection. So that brings up the question as to capacity in which they act.

[566] Now, there has been mentioned here that at least one defendant, defendant Rocco, is in perhaps a different position so far as the instruments are concerned, the bonds are concerned, than the other two defendants. Therefore, because of the evidence generally, I think it best that I define certain other terms in the law of negotiable instruments, which applies to this case.

A holder in due course is a holder who has taken the instrument under the following conditions—then there are four conditions: first, that it is complete and regular upon its face; second, that he became the holder of it before it was overdue and without notice that it had been previously dishonored, if such was the fact; third, that he took it in good faith and for value; fourth, that at the time it was negotiated to him—that means, "negotiated" there means delivered to him, transferred to him—he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it.

Now, as the Court understands this evidence, in the theory of the case upon both sides, neither the bank nor Mr. Parnell claims that they paid anything of value for the bonds. So that they are not holders, don't claim to be holders in due course. But every holder is deemed *prima facie* to be a holder in due course. So that Mr. Rocco, under the evidence in this case and under the contention of his [567] counsel, is presumed to have been a holder in due course. But you will recall the definition.

Now, the difference perhaps may affect in some degree the consideration of this matter by the jury as to the facts.

Now, we come next then to the application of the principle of burden of proof, as I have mentioned, as it applies to this case. The general proposition of law is that a person dealing with bearer instruments may do that, just simply pass title by delivery. As I have indicated, however, in the case—and if you find in this case that the plaintiff owned these bonds, that they were stolen from it—then the burden of proof so far as this plaintiff is concerned is to show that fact, that these bonds were owned by it, that they were lost by it in the manner as shown by its evidence. Then the two defendants, Parnell and the bank, not claiming to be owners for value, but as conduits for redemption, must come forward and they then have the burden of showing that they acted innocently, honestly, and in good faith. Plaintiff then shows certain things, as I have indicated those things, and then it is up to those two defendants, in the first place, to exculpate themselves from any charge of any dishonesty.

Now, if any person such as Rocco, as I understand his counsel claims him to be, is entitled to the presumption—and I think he is—in the first instance, a holder in due [568] course for value—that is what he is presumed to be—it is up to the plaintiff then all the way through to assail his title, to show a defect in his title, to show that he wasn't what he claimed to be—in other words, a holder in due course for value. And it is up to them to prove—the plaintiff continues in the burden of proof in this case, as the Court sees it, against Rocco all the way through.

Now, the law then is no different, except in its application, when it comes to the question of proof, because the

proposition of honesty and good faith in the transaction in the case of Rocco, the burden would be that they prove the negative side of that—in other words, that he didn't act honestly and in good faith; whereas, the other two defendants would come forward and show that they did.

Now, that brings us down then to the real proposition in the case on the question of law—that is, no question of law, of course, is any less important than the other—but over which there has been considerable, we will say discussion at side bar and during these intermissions, and so on, when the jury wasn't present, among other things.

To impose liability upon any one of the defendants, on the evidence in this case, it is not enough to show that he took the bonds under circumstances which ought to excite the suspicion of a prudent man and cause him to make inquiry— [569] when I say "he", I am, of course, using "he" as including the corporation—but that he had actual knowledge of an infirmity or defect or of such facts that his failure to make further inquiry would indicate a deliberate desire on his part to evade knowledge because of a belief or fear that investigation would disclose a fraud in the transaction. This test, that of good faith with respect to negotiable instruments, is prescribed alike in common law and under the negotiable instruments law. And that is so, so far as law is concerned, in the Federal courts or anywhere else, and in this court.

Now, the issue then is as to each defendant: Did he or it have actual knowledge of the infirmity or defect or knowledge of such facts that his action in taking the bonds amounted to bad faith? No one of the defendants in this case could wilfully and intentionally close his eyes to any fact to avoid knowledge which was at hand under the

circumstances presented. In dealing with bonds of the character here prescribed, a person may be forgetful or negligent—and that applies particularly to the cashier of the defendant bank—and no liability can be founded on negligence or forgetfulness alone. The test is still one of honesty and good faith, even though some notice had been given by mail, such as has been offered in this case—that is the notice that was sent out, if you believe the record, the evidence, [570] that the F. B. I. sent out notices to all banks in this area, which may have included the defendant bank.

Now, members of the jury, bearing on the bad faith of any one of the defendants or of all of them, you of course may consider all the facts and circumstances surrounding the redemption of the bonds.

As to the defendant Rocco, in the event that you are satisfied under the evidence that the plaintiff has not assumed, not proved, undertaken, assumed the burden of proof to show that he was not a true holder, didn't act honestly and in good faith, then your verdict should be for him.

As to the defendant Gilbert S. Parnell, you will take into consideration the evidence presented here as to all the facts and circumstances of his delivery of the bonds to the defendant bank and his receipt of the proceeds and his disbursement of the proceeds. You will recall the testimony in this regard. You will turn your mind to the proposition as to whether this matter was handled in an ordinary and routine manner or that the manner in which it was handled amounts to bad faith and knowledge on the part of the defendant Parnell. Now again, the question then of how it was done, whether receipts were given,

whether it was done in the usual manner, whether it was cash, many bills—whether time was taken to handle it in cash rather than by check [571] or some other way, whether a notice was given, whether it was received, what it amounted to,—all that bears on the question of good faith and honesty.

If they had notice, of course they had actual knowledge, and then they acted the way they did—that is, those two, the bank and Mr. Parnell, for instance—it amounts to bad faith. But if they acted under no notice whatsoever and what they considered to be the ordinary, routine way of doing it in transactions of this kind, handling transactions of this kind, and in good faith and in all honesty, then there is no liability on their part. So this matter is up to the jury.

And that same thing, of course, applies to the bank. In considering the bank, you have a situation presented of bearer bonds. And mention has been made of the coupons on those bonds. Of course the evidence is undisputed, that the bonds had been called as of May 1st, and Home Owners' Loan wouldn't pay any interest after that date. You have then the fact on bonds that turned up some four years later, during the intervening time no one was liable for interest, whether or not that fact and other facts should have brought home to defendant through its cashier the requirement of further inquiry. All that matter is for the jury, under the circumstances.

Now, the parties here—as is usual and customary—[572] have handed the Court requests for charge. And I am going to go over them at this time. The ones that I have refused I will not mention. The record indicates the disposition on those.

Plaintiff has submitted a number of points, some of which I have affirmed and some I refused.

Number 4 I am affirming:

> "This is a civil suit and the issues do not involve the identity of the person or persons taking the bonds from the plaintiff. The only issue before you in that respect is whether or not the bonds were stolen or unlawfully taken from the plaintiff by some person or persons."

I think that is true. You are not concerned here who took them.

Number 5:

> "If you find as to a particular defendant that he or it had actual notice of a defect or infirmity of title of the bonds at the time he took possession of them, your verdict as to that defendant should be in favor of the plaintiff."

Well, that is, of course, if you find that way, if you so find, and it follows naturally, that is what I assume, then.

Now, number 7 perhaps is repetitious, but I think perhaps plaintiff is entitled to have it stated. Number 7 [573] is affirmed.

> "Good faith is the opposite of bad faith. To charge a defendant with bad faith, it is not enough to show that the defendant took the bonds under circumstances which ought to excite the suspicions of a prudent man and cause him to make inquiry. On the other hand, a person may not wilfully close his eyes and shut his ears. If the failure to make inquiry was because of a desire on the part of a defendant to avoid knowledge because of a belief or fear that investigation would disclose a defect, you would be justified in finding that

particular defendant had not acted in good faith. One who claims to have acted in good faith must have dealt fairly and honestly. He may not claim the defense of good faith if the circumstances are such as to justify the conclusion that his failure to make inquiry arose from a suspicion that inquiry would disclose a vice or defect in the title to the bonds."

No. 9 is affirmed. I am still talking about the plaintiff's requests.

"In order to support a finding of bad faith it is not necessary to show that the person whose acts are in question knew the exact defect or vice in the title of the person from whom he took the bond. It is sufficient to show that he had notice that there [574] was something wrong about the title of the person from whom he acquired the bonds, although he did not have notice of the particular wrong that was committed. In other words, if you find that a particular defendant had knowledge that in some way the title to the bonds was tainted with fraud or illegality, it is unnecessary for you to consider whether or not that defendant knew the particulars or even the nature of the fraud."

Number 11:

"The fact that the bonds were issued by Home Owners' Loan Corporation and guaranteed by the United States is immaterial and of no consequence as to the defendants now involved in so far as their having acted in good or bad faith is concerned. If they did not act in good faith the governmental character of the bonds would not constitute a defense."

In other words, we were concerned when the Federal Reserve Bank was in the case—there was much colloquy.

much conversation back and forth as to the character and nature of the bonds on account of the fact, but largely upon the proposition that the Court has held that the Federal Reserve Bank was the fiscal agent of the United States and was in duty bound to pay the bonds they were discharged. So the fact now that these bonds had been [575] guaranteed, as appears in this evidence—had been guaranteed by the United States, have some of the attributes of ordinary Government bonds, the question of bad faith or good faith is still in the case as to all these defendants. And that matter is solely for the jury.

Now, the First National Bank in Indiana has presented points.

I will affirm number 6:

> "You have heard the testimony in this case in behalf of plaintiff that it was the owner and in possession of the bonds in question on May 2, 1944, and how, by the testimony of the young lady, Miss Britton, they disappeared from plaintiff's bank's possession. If now you find that as a fact defendant First National Bank in Indiana, Pa., acted in good faith in having the said bonds redeemed, then as between plaintiff and defendant bank your verdict must be in favor of said defendant, First National Bank in Indiana."

Well, that is re-affirmation of what I have been saying. If each defendant acts in good faith, of course he is not to be held liable. That is the issue here that you have—that is the main issue in the case. There are other matters that you must consider, of course.

Now, members of the jury, the claim here by the plaintiff is for $57,600, the Court understands. Is that correct, [576] Mr. Kirkpatrick?

Mr. Kirkpatrick:

That is correct, your Honor.

The Court (Continuing):

However, it is up to you, it is up to this jury to find the amount. And I want to stress that the issue as between the plaintiff and each of the three defendants is a separate and distinct issue. In other words, the plaintiff has sued each one of these three defendants. Now, the law permits that they be sued in one lawsuit. That is to avoid repetitious trial time, you can see that. But you must examine the facts and have due regard for the law on the issue presented, because each defendant is entitled to separate and distinct and individual consideration at your hands. And so for that reason I direct your attention carefully to that fact, so that you don't consider them all as a group. They haven't been charged here with any conspiracy or combination whatsoever.

But in that connection, too—it has been mentioned here, I think—you may be curious and wonder whether or not, if you bring in a verdict against all three of them, the bank is going to recover a triple amount. That is not going to take place. The Court will see, of course, that that does not occur—and the bank is only claiming the right to reimbursement of its loss that it alleges took place, and it may collect from one or all, and so forth, depending upon what you do. In any event, the bank does [577] not seek over $57,600 as principal. That would be the amount due on the bonds on May 2, 1944, which is the date, under the evidence, on which the bank was assembling the bonds for redemption and turning in to the Home Owners' Loan Corporation, in transit.

Now, the question arises, of course, here: If under all the evidence, careful consideration of all the evidence, as

I have indicated to you—and I am not telling you or indicating to you whatsoever how you are going to find—if you find on the issues for the plaintiff and against one or more of the defendants, you will fix the amount on the verdict slip. Now, the verdict slip reads this way—perhaps none of you has seen before a verdict:

"Now, October (blank) 1954"—

And you insert the date, and I hope it will be today and not tomorrow morning—

"we, the jurors impaneled in the above entitled case, find in favor of"—

If you find for the defendant, in that case—and I am reading from the verdict slip of Arthur A. Rocco—if you find for the defendant Arthur A. Rocco, that would be the end of it. If you find for the plaintiff, then you say you find for the plaintiff in the sum of—the amount in the first instance would be, under the evidence, the $57,600—if you believe all the evidence.

[578] The question then is—they claim interest. Now, the bonds bore interest at three per cent. The law, however, generally is that a person who has had money or property withheld is entitled to six per cent interest. That is not a hard and fixed proposition, however. So the jury will take into consideration that the investment in the first place was only three per cent, also take into consideration that the law generally fixes six per cent as the maximum interest. And if you care to bring in interest—and you are not bound or required to bring in interest—you may, if you so desire, fix the amount, the principal amount of the loss. And, of course, it is up to the jury, but you might bring in a lesser sum. But under the evidence you should go all in one way, as the Court sees it, all for the

plaintiff or all for the defendants in this case, under the evidence. So if you decide to add interest, then you compute your interest. Now, of course, that brings up the question then of the dates of interest. Well, the earliest date alleged here, as I see it, is September 25—September 28, and the last date, as I recall it, is October 25, 1948. The defendants are not charged with anything prior to those dates. So the period of time would naturally fall, on September 28 in one instance, and October 25, 1948, up to the date of your verdict. So you would add—you will add the amount of the interest that you fix to the [579] principal, so that you bring in a sum certain. In other words, if the interest, we will say is—take, for instance, a thousand dollars, and $57,600, all right, your verdict is for $58,600—you see? So I think the jury understands.

Now I will ask counsel for the plaintiff whether you desire additional instructions, or whether you desire correction in the instructions given.

Mr. Kirkpatrick:

The plaintiff does not request any additional instructions and has no correction, your Honor.

The Court:

All right. The same question is addressed to Mr. Rocco's counsel.

Mr. Casey:

The defendant Rocco asks for no additional instructions.

The Court:

All right. Mr. Duggan, I put the same question to you.

Mr. Duggan:

We ask for no other or additional instructions. You have already stated it on the points, I take it.

The Court:

Yes, that's right Mr. Miller, the same question is addressed to you.

Mr. Miller:

Our only exception is as to the burden of proof in the charge.

The Court:

Counsel then will come forward and take your exceptions, so that I may know, if there is any exception there that I think I want to myself add after a verdict—

[580] *Mr. Miller:*

Exception as to the burden of proof, with reference to the charge. And I understand counsel are granted—I believe that record was made—objections as to the affirmance of points.

The Court:

Oh, yes, you have that.

Mr. Miller:

Perhaps what is one oversight was with reference to—I believe your Honor affirmed paragraph 7 of our points for charge, and it was not read as yet, I believe.

The Court:

Oh, yes, that is right.

(To jury) Mr. Miller has called my attention to a point of law which he submitted, which I intended to affirm, and so announced to him, and I overlooked it. Number 7 is:

"Before you can find a verdict against the defendant First National Bank in Indiana, in this case, you

must first find that the bonds in question were unlawfully removed from plaintiff's possession."

I think perhaps I have indicated that before. In other words, you must find first that the plaintiff bank owned them and they were unlawfully taken from their possession. That is his theory of the case.

Anything else, gentlemen?

All right, then. The bailiffs may be sworn.

(Deputy marshals sworn.)

Now, members of the jury, you will now retire in [581] the custody of the officers and proceed upon your deliberations. I might say to you, and not intending to bind you by anything at all—Oh, wait at this point. The alternate jurors, the two young ladies sitting in front of the rail, unless any one of the members of the jury feels that he or she cannot proceed and decide the case because of some incapacity, physical illness of some kind, we will excuse the alternate jurors. How are the members of the regular jury, the members in the box—how do you feel? All right? Anybody that is ill speak up. All right. It appearing now that the Court has inquired of the members of the jury, the first twelve, and they are in good physical condition and can undergo the rigors of the final hours and minutes of deliberation here, the two alternate jurors are excused. Thank you very much, ladies, and I think you better report at the clerk's office, and then you will receive further assignment.

(Jurors retire.)

[582] 3:15 p. m.

(The jury returned to the courtroom.)

(Present: Messrs. Kirkpatrick, Becker, Casey, Duggan, Miller, Jr.; Defendant Rocco also present.)

The Court:

Ladies and gentlemen of the jury, I understand you have an inquiry of the Court. Is that correct?

No. 2 Juror:

We do, your Honor.

The Court:

Will you hand it up? It is in writing. I take it.

(Paper handed to the Court.)

The Court:

Now, ladies and gentlemen of the jury. I think I covered that at least three times in the charge. That is not your concern.

I am going to read the question and then I will cover it again for you.

The communication in writing, addressed to the Court, gentlemen, reads this way:

> Honorable Judge Willson:
>
> If we, the jury, find the issues in this case in favor of the plaintiff, will each of the defendants be responsible to make restitution jointly or individually.

The foreman, that is Mr. Gordon, signed it.

That is the query put to the Court.

I think there is no question about this. It is a [583] legal proposition. The issue that you mentioned you are

to find and it is no concern as to who or which one, whether all or both or any one of them, join in the payment. I take care of that.

I want to explain to you very carefully, so that you understand, that the plaintiff is only seeking and can only collect one amount. You know what that amount is. The plaintiff might have filed four separate suits and then we would have consolidated them for trial purposes. They sued all four, the two corporations and the two individuals in this case. Now there are three left.

You render your verdict according to the law and the evidence, as I have indicated, and don't worry about who or when or how many pay. We will take care of it.

Is there any question by counsel?

Mr. Casey:
No, your Honor.

Mr. Kirkpatrick:
I have none, your Honor.

The Court:
The jury may retire. We will recess.
(The jury retired.)

3:50 p. m.

(The jury returned to the courtroom.)

The Court:
Members of the jury, have you agreed upon a verdict?

No. 2 Juror:
We have, your Honor.

[584] *The Court:*

Hand it to the clerk.

(Verdict handed up.)

The Court:

Members of the jury, I notice in each of the three verdicts, you find for the plaintiff. In writing, on the verdict, you have put in for the plaintiff. You, however, have not inserted the amount, nor said anything about the interest.

Now, gentlemen, we might inquire, if there is no objection, as to what that amount might be. I think probably it is a matter that if you care to you may stipulate. Otherwise, I will send this jury out. In other words, the amount was to be stated, if you will remember.

I am not critical of you, you understand, because I know you are not used to this sort of thing, but the amount should be stated on the verdict. It is probably best, under the circumstances, that I ask you to retire, take the verdict slips back with you, and fix the amount, not hearing anything from any of the attorneys as to what obviously, it seems to the Court, the amount would be. On the other hand, it may not be that amount.

Mr. Kirkpatrick:

I have no objection, your Honor.

The Court:

I wouldn't think you would, no.

I think under the circumstances I will ask the jury to retire. If you want to do it right there, you don't need to go upstairs.

[585] *Jurors:*

Yes.

The Court:

I will hand the verdict back and the foreman will insert the amount in each case, that you have agreed on. I assume you have agreed on the amount.

(Verdict slips handed to jury in the box.)

Juror No. 10:

Your Honor, do I write this on each one?

The Court:

Yes, write a figure on each slip.

(Verdict slips handed back to the Court.)

The Court:

Now, members of the jury, you will hearken to your verdict.

The Clerk:

Members of the jury impaneled in the case of Bank of America National Trust and Savings Association, Plaintiff, against Arthur A. Rocco, at No. 9386 Civil Action, you say you find in favor of the plaintiff, $57,600. So say you all.

In the case of Bank of America National Trust and Savings Association, Plaintiff, against First National Bank in Indiana, Defendant, at No. 9386 Civil Action, you say you find in favor of the plaintiff, $57,600. So say you all.

In the case of Bank of America National Trust and Savings Association, Plaintiff, against Gilbert S. Parnell, Defendant, at No. 9386 Civil Action, you say you find in favor of the plaintiff, $57,600. So say you all.

The Court:

All right, members of the jury. Now [586] your verdict has been received and recorded.

Is there any question?

(No response.)

The Court:

Members of the jury, you are discharged from your duties. You have had a full week. I am only sorry you are going to be discharged during the storm, but that is something the Court can't help.

You will report back to the clerk's office for further assignment. Of course, that will be next week.

Court is now adjourned until ten o'clock tomorrow morning.

Interrogatory by Jury.

rec'd 3:20 P. M.
10/15/54

Hon. Judge Willson:

If we the jury find the issues in this case in favor of the Plaintiff will each of the defendants be responsible to make restitution jointly or individually?

THE FOREMAN.
M. L. Gordon, Sr.

Copy of Verdicts.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION
vs.
ARTHUR A. ROCCO.
} No. 9386 Civil Action

VERDICT.

And now, to-wit: October 15, 1954, we, the Jurors empaneled in the above-entitled case, find in favor of the Plaintiff $57,600.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION
vs.
GILBERT S. PARNELL.
} No. 9386 Civil Action

VERDICT.

And now, to-wit: October 15, 1954, we, the Jurors empaneled in the above-entitled case, find in favor of the Plaintiff $57,600.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION
vs.
FIRST NATIONAL BANK IN INDIANA.
} No. 9386 Civil Action

VERDICT.

And now, to-wit: October 15, 1954, we, the Jurors empaneled in the above-entitled case, find in favor of the Plaintiff $57,600.

Motion and Reasons to Set Aside the Judgment on the Verdict Against First National Bank in Indiana, or in the Event Dismissed, Then to Open Said Judgment and Grant a New Trial.

(Filed Oct. 22, 1954.)

And now, to-wit this 22nd day of October, 1954, comes First National Bank in Indiana, by its attorneys, Miller & Miller, and moves the Court to set aside the judgment on the verdict against First National Bank in Indiana, or if said motion is dismissed, then to open said judgment and grant a new trial, under Rule 50 (b) of Federal Rules of Civil Procedure, and as reasons therefor assigns the following:

FIRST: The Home Owners Loan Corporation bonds in question *payable to bearer* were issued under Act of Congress approved April 27, 1934 and were unconditionally guaranteed by the United States of America. They are controlled by federal law, Act of Congress and federal regulations. The learned Court erred in not following the federal law, Acts of Congress and federal regulations under which this action against defendant First National Bank in Indiana should have been dismissed. Therefore the judgment entered on the verdict should be set aside.

SECOND: The learned Trial Court erred in refusing the points submitted in behalf of defendant First National Bank in Indiana as follows:

1. Under the evidence in this case and the law applicable thereto, your verdict must be in favor of defendant First National Bank in Indiana, Pa.

Motion and Reasons to Set Aside the Judgment on the Verdict Against First National Bank in Indiana, or in the Event Dismissed, Then to Open Said Judgment and Grant a New Trial.

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2. (Should the Court refuse Point No. 1.) You are instructed that the burden of proof is on plaintiff to establish by clear and convincing evidence that defendant First National Bank in Indiana, Pa. acted in bad faith in having the bonds in controversy in this case redeemed; otherwise your verdict must be for said defendant, First National Bank in Indiana.
3. In order to establish bad faith on the part of the defendant First National Bank in Indiana, Pa. in having said bonds redeemed, plaintiff must show actual notice or knowledge of a defect or infirmity to the title of the bonds at the time of their delivery to said defendant bank for redemption. (296 U. S. 27.)
4. Unless you find as a fact that the defendant First National Bank in Indiana had *actual notice or knowledge* of a defect or infirmity in the title to the bonds in question at the time they were delivered to it for redemption, your verdict must be for said defendant, First National Bank in Indiana.
5. You are also instructed that the stipulation made by counsel as to what the representative of the Federal Bureau of Investigation would testify to and was placed on the record in this case, is insufficient to charge the defendant First National Bank in Indiana with notice of defect or infirmity of the Home Owners Loan bonds in question in this case.

Additional point submitted and refused.

8. If you find a verdict against any defendant other than the First National Bank in Indiana, then your verdict

must be in favor of defendant First National Bank in Indiana.

THIRD: The learned Court erred in not holding defendant First National Bank in Indiana was a mere conduit or agent without notice as between Gilbert S. Parnell and Federal Reserve Bank in the redemption of the bonds in question for which it received but $10.00 as expenses in one instance and $20.00 in the other, having paid the full proceeds of said redemption funds to Gilbert S. Parnell, and therefore it cannot be chargeable with conversion of the bonds in question.

FOURTH: The stipulation as to what the F. B. I. representative Hallford would testify to if called to do so was as follows:

> Mr. Hallford, if called, would testify that the Exhibit No. 10, which was shown him yesterday, is a photostat of a mimeographed circular, put out by the Pittsburgh office of the Federal Bureau of Investigation. This was done pursuant to request of the Los Angeles office of the F. B. I., by teletype, dated May third, 1944, at seven p. m. Subsequent to the mailing of the circular, the Pittsburgh office advised the Los Angeles office by letter, dated May 22, 1944, that the circular had been mailed to all banks and security brokers in the Pittsburgh district.
>
> There is no specific evidence in the file relating to the mailing to the First National Bank of Indiana, Pennsylvania. (From record of testimony, page 228.)

This stipulation was irrelevant, and was wholly insufficient to constitute a charge of actual notice or knowledge to defendant bank of defect or infirmity in the bonds as of September and October of 1948.

FIFTH: The learned Court erred in admitting in evidence Plaintiff's Exhibit 10 to charge defendant bank with notice of the bonds in question having been stolen.

SIXTH: The learned Court erred in admitting in evidence to charge defendant First National Bank in Indiana with bad faith the following exhibits:

Ex. 7—Letter from Federal Reserve Bank of San Francisco to Federal Reserve Bank of Cleveland dated May 5, 1944.

Ex. 8—Letter from Bank of America to Federal Reserve Bank of Cleveland dated May 9, 1944.

Ex. 9—Letter from Treasury Department to Mr. Fleming, Federal Reserve Bank of Cleveland dated May 15, 1944.

Ex. 11—Letter from Treasury Department to Federal Reserve Bank of Cleveland, dated June 27, 1944.

Ex. 12—Photostat of letter from Federal Reserve Bank of San Francisco to Pittsburgh Branch of Federal Reserve Bank of Cleveland, dated October 31, 1944.

SEVENTH: The learned Court erred in not holding that defendant bank, as a matter of law, was no more chargeable with notice of defect or infirmity of the bonds by reason of the unclipped coupons than was the Federal

Reserve Bank which accepted them and paid their redemption value without inquiry and has been discharged from liability.

EIGHTH: The learned Court erred in refusing to hold that nothing short of actual notice or knowledge of defect or infirmity to defendant bank could or would create a liability against it. There was no evidence of any actual notice or knowledge of defect or infirmity to submit to the jury in this case.

NINTH: The learned Court erred in overruling objections in behalf of defendant bank to the record of this Court at No. 13723 of the United States vs. Paul J. Straitiff to impeach his testimony for the following reasons:

(a) Because said record to impeach the testimony of the witness Straitiff was not proper rebuttal testimony.
(b) That when evidence of conviction was introduced for the purpose of impeachment, other parts of said record of conviction tending to show a good reputation for truth and honesty became relevant and admissible. Such other evidence was rejected.

TENTH: The verdict rendered against defendant bank is illegal in that but one verdict for conversion is recoverable, and not three verdicts against each of the defendants.

ELEVENTH: The learned Court erred in not holding the evidence conclusively established as between plaintiff and defendant bank that plaintiff's conduct made possible the loss and therefore the judgment entered on the verdict should be set aside.

TWELFTH: The learned Court erred in affirming and not refusing plaintiff's points numbered 4, 5, 7, 9, 10 and 11.

THIRTEENTH: The learned Court erred in not holding it was against public policy to interfere with the defendant bank's redemption of the bonds in question which were handled by defendant bank in the usual and ordinary course of banking.

WHEREFORE, for the reasons as herein stated, counsel for defendant, First National Bank in Indiana, respectfully requests your Honorable Court to set aside the judgment entered on the verdict in the above case, or upon refusal to grant a new trial.

MILLER & MILLER,
HARVEY A. MILLER,
HARVEY A. MILLER, JR.,
Attorneys for First National Bank in Indiana.

Memorandum Opinion and Order.

OPINION

WILLSON, D. J.

This case might be termed the civil aftermath of the criminal case tried by Judge Marsh in this Court and reported as *United States v. Rocco*, 99 F. Supp. 746, affirmed *per curiam* by the Court of Appeals, 193 F. 2d 1008. One phase of the litigation relating to the disappearance of bonds from plaintiff's bank was before Judge Gourley on a motion for summary judgment and is reported in *National*

Surety Corp. v. First National Bank in Indiana, 106 F. Supp. 302. The verdict of the jury was in favor of plaintiff in the amount of $57,600.00 against each of the three defendants, which was the face value of the bonds. The jury did not award any interest.

Defendants Gilbert S. Parnell and the First National Bank in Indiana ("Bank in Indiana") have motions pending for judgment *N. O. V.* and for a new trial. Defendant Arthur A. Rocco filed similar motions but withdrew them at the argument. Parnell and the Bank in Indiana insist that there was insufficient evidence to go to the jury and that the burden as to good faith was on the plaintiff throughout the case. Plaintiff's evidence indicated that the bonds in question were stolen from its bank on May 2, 1944. This point was left to the jury in the charge. The bonds were handed to the Bank in Indiana by Parnell and were, by the Bank in Indiana, forwarded to the Federal Reserve Bank by letter for collection. Neither Parnell nor the Bank in Indiana claimed to be a holder in due course within the definition of that term in the Negotiable Instruments Act, 56 P. S. 132. At the close of plaintiff's evidence, a motion by the Federal Reserve Bank of Cleveland for a directed verdict in its favor under Rule 50 (a) was granted. Plaintiff at argument indicated that it would not pursue that matter further so that under the present record the Federal Reserve Bank of Cleveland is dismissed finally from the case. The case was tried on the theory that the evidence indicated that the bonds were stolen from the plaintiff and that the defendants Parnell and the Bank in Indiana, not having paid anything of value for the bonds, were under the duty of showing that they acquired possession of the bonds innocently and in good faith and that in the trial the

burden rested on them to show good faith. With respect to the trial procedure, especially in regard to the burden of proof, this Court followed the principles enunciated in *First National Bank of Blairstown v. Goldberg,* 340 Pa. 337. The question as to whether defendants Parnell and the Bank in Indiana acted innocently and in good faith was for the jury. The jury has spoken and it is believed that the verdict is just and proper under the evidence presented. In the opinion of the Court substantial justice is done by the jury's verdict. The motions will be refused.

Plaintiff presented a motion to amend the judgment by adding to the $57,600.00 principal, interest at six per centum on the various amounts which made up the jury's verdict. The matter of interest was left to the jury under the charge. It was indicated to the jury that it might give interest from the date of the loss of the bonds to the date of the verdict and fix the rate of interest. It is pointed out that the claim of plaintiff was unliquidated until the verdict. It is believed that the question of interest is discretionary and again the Court is not disposed to disturb the finding of the jury. Accordingly, the motion to amend the judgment in this respect will be refused.

ORDER.

AND NOW, this 16th day of November, 1954, it is ORDERED:

1. Motions of defendant Gilbert S. Parnell for judgment *N. O. V.* in his favor and for a new trial are refused; and

2. Motions of the First National Bank in Indiana for judgment *N. O. V.* in its favor and for a new trial are refused; and

3. Motion of plaintiff, Bank of American National Trust and Savings Association to amend the judgment to include interest at six per centum per annum on the amount of the jury's verdict is also refused.

JOSEPH P. WILLSON,
United States District Judge.

Judgment.

October 15, 1954 Pursuant to Verdicts and Order, Judgment is hereby entered in favor of the plaintiff and against each of the defendants. Arthur A. Rocco in the sum of $57,600.00, Gilbert S. Parnell in the sum of $57,600.00 and again First National Bank in Indiana in the sum of $57,600.00.

JAMES H. WALLACE, JR.,
Clerk.

Plaintiff's Exhibit 1-A, Specimen Copy of Bonds.

(See Footnote No. 1) (See Footnote No. 1)

Series A 3% (See Footnote No. 2)

Dated May 1, 1934
Due May 1, 1952

Redeemable on and after May 1, 1944

Interest payable May 1 and November 1

HOME OWNERS'
LOAN CORPORATION
of the
UNITED STATES OF AMERICA

Is indebted to the bearer in the sum of

(See Footnote No. 3)

This bond is payable May 1, 1952, with interest on said principal sum at the rate of 3 per centum per annum, payable semiannually following date of issue as evidenced by the attached coupons and payable on surrender thereof. The corporation will pay principal and interest, when due, at the Treasury Department, Washington, D. C., or at any government agency or agencies in the United States which the Secretary of the Treasury may from time to time designate for the purpose. The right is reserved to call by lot any bond or bonds for payment, at par, on any interest payment date, on or after May 1, 1944, with interest to date of payment, provided, that in case any such bonds are so

called, notice will be given of the number of each bond so called by publication in a newspaper, printed in the English language, of general circulation in each state of the United States, not more than sixty and not less than thirty days prior to such interest payment date, and interest on any such bonds so called shall be discontinued upon such interest payment date after such advertisement whether the bond and accompanying coupons are surrendered or not. This bond is issued under the authority of the Act of Congress entitled the "Home Owners' Loan Act of 1933" as amended (by Act of Congress approved April 27, 1934) which provides that this bond shall be exempt, both as to principal and interest, from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States or any district, territory, dependency, or possession thereof, or by any state, county, municipality, or local taxing authority.

Any person indebted to the corporation may make payment to it in part or in full by delivery to it of its bonds which shall be accepted for such purpose at face value.

IN WITNESS WHEREOF This bond is executed in the name of Home Owners' Loan Corporation, authenticated by the engraved signature of the chairman of its Board of Directors and attested by the engraved signature of its treasurer and its seal is hereto affixed; all as of May 1, 1934.

HOME OWNERS' LOAN CORPORATION.

JOHN H. FAHEY,
(Seal) *Chairman of Board of Directors.*

Attest:
P. J. MALONEY,
Treasurer.

Plaintiff's Exhibit 1-A, Specimen Copy of Bonds.

This Bond is fully and unconditionally guaranteed both as to interest and principal by the United States.

THE UNITED STATES OF AMERICA,

By HENRY MORGENTHAU, JR.,
Secretary of the Treasury.

Footnote No. 1 At this point the denomination of the Bond was given in figures.
Footnote No. 2 At this point the serial number of the bond was given.
Footnote No. 3 At this point the amount of the principal of the bond was given in words.

(COUPON FORM AS ON A $1000. BOND)

HOME OWNERS' LOAN CORPORATION

Will pay to bearer on NOV. 1, 1944
at the treasury
department, Washington,
or at a designated agency, $1500
being six months interest
then due on
$1000 3% HOME OWNERS' LOAN CORP. Series A. Bond
unless called for previous redemption

(Same serial no. as on Bond)

P. J. MALONEY.
Treasury 21.

Plaintiff's Exhibit 1-A, Specimen Copy of Bonds.

(ENDORSEMENT ON COVER OF A $1000. BOND)

HOME OWNERS'
LOAN CORPORATION

Coupon Bond
$1,000

Dated May 1, 1934
Due May 1, 1952

Redeemable on and after
May 1, 1944

Interest payable
May 1 and November 1

Principal and interest payable
at the
Treasury of the United States
or government agency
as designated by
The Secretary of the Treasury
Washington, D. C.

United States Department of Justice
Post Office Box Number 1525
Pittsburgh, Pennsylvania
May 20, 1944

Re: Stolen and Counterfeit Bonds:

AK 1170911	AK 612958	AX 194519K	AH 254596F	A[illegible]35023C	AH 482793C	AH 190948J
AK 1207178	AK 688784J	AX 80540L	AH 254595E	A[illegible]35024D	AH 246663C	AH 2158830
AK [illegible]	AK [illegible]	AX 1830428	AH 34340L	AH 272763C	AH 395963C	[illegible]
AK 359984J	AK 612978	AX 13113C	AH 111250L	AH 272764D	AH 395962B	AH 90[illegible]
AK 700228	AK 612988J	AX 61123C	AH 47252B	AH 272765E	AH 359088J	

I wish to thank you in advance for your cooperation in this matter.

Very truly yours,

H. T. O'Connor

H. T. O'CONNOR
Special Agent in Charge

Peffer Ex. 10

APPENDIX

[1] IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, Plaintiff,
v.
ARTHUR A. ROCCO, GILBERT S. PARNELL, FIRST NATIONAL BANK IN INDIANA and FEDERAL RESERVE BANK OF CLEVELAND, Defendants.

Civil Action No. 9386.

Further pretrial held at Pittsburgh, Pa., October 6, 1954
BEFORE: HONORABLE JOSEPH P. WILLSON, Judge.

COUNSEL PRESENT

ROBERT L. KIRKPATRICK, Esq., THOMAS W. POMEROY, JR., Esq., and ROBERT L. BECKER, JR., Esq., on behalf of the plaintiff,

ALOYSIUS F. MAHLER, Esq., on behalf of Arthur A. Rocco;

JOHN DUGGAN, JR., Esq., on behalf of Gilbert S. Parnell;

HARVEY A. MILLER, Esq., and HARVEY A. MILLER, JR., Esq., on behalf of First National Bank in Indiana;

FRANK HARRISON, Esq., (Cleveland) on behalf of Federal Reserve Bank of Cleveland;

D. MALCOLM ANDERSON, Esq., on behalf of the United States of America.

Transcript of Pretrial.

[27] *The Court*: As I understand plaintiff's theory when it comes to you, he may show, expects to show, on his side [28] of it, his allegations, supported by proof, that the bonds were stolen when they came through your bank.

Mr. Miller, Jr.: That is correct.

The Court: Then, as I understand Mr. Kirkpatrick, he may, having made out a prima facie case, call upon you. The burden shifts to you. Do you agree with that proposition or not?

Mr. Miller, Jr.: To the extent that he has made out a prima facie case, I think under both federal and state law the burden does shift to us to show that we took in good faith.

Now, I have one reservation in that regard; the fact that it must be remembered that the Bank in Indiana is a member bank of the Federal Reserve System, and as such took these bonds and transmitted them through the Federal Reserve Bank here, locally. However, we are prepared—

The Court: How does that help your position?

Mr. Miller, Jr.: We are operating, then, under the federal regulations.

The Court: Does your membership make you *ipso facto*—are you an agent of the Federal Reserve Bank?

Mr. Miller, Jr.: No, I don't think ispo facto that affects anything, other than the fact that we are ap-

praised under the federal regulations generally and we operate under the federal regulations in carrying out these [29] matters. I think that might be true even of a bank not under the Federal Reserve System.

I do think clearly and distinctly that it is the federal law that controls it, although, as I say, I don't think there is anything incompatible between the two. As it becomes necessary, presuming that the prima facie case will be made out, we will then be prepared to show that the bank took in good faith, without any notice, and transmitted them on for clearance, and that they then fall under the well known and I think much talked of Herr Gruntal case, which clearly shows the position of a transmitting agent, in a matter like this, for clearance.

* * * * * * *

[36] *The Court*: We want to be realistic. Why can't we all say these were stolen bonds, in '44. If he can prove it, the man has been convicted of it, is that an issue in the case any more?

Mr. Duggan: We wouldn't admit, as far as we are concerned, that we knew they were stolen.

The Court: I am not saying that.

Mr. Duggan: They don't plead that they were stolen bonds.

Mr. Kirkpatrick: We plead that we were the owner of them and that these people converted them.

Mr. Duggan: They were missing.

The Court: The evidence is they were stolen from your bank.

Mr. Kirkpatrick: That is correct, your Honor. We expect to put on witnesses to that effect. It will take some time. We have to prove, for example—

The Court: We get down to this proposition. It is going to develop in the course of the trial that people are going to say the bonds were stolen and somebody is going to object, unless that is more or less out of the [37] issue. There is no use kidding ourselves about the fact. That is no defense on anybody's part.

Mr. Miller, Jr.: If the Court please, I think one difficulty is the conclusiveness of the statement that the bonds were stolen. That is the bonds were stolen from the bank. We have the problem—

The Court: From the Bank of America.

Mr. Miller, Jr.: From the Bank of America.

We have the problem of implications from that. For instance, if they were stolen from the Bank of America, the implication is that the Bank of America owned the bonds originally. We don't know that. The implication that they were actually stolen. Perhaps this is an embezzlement procedure. We don't know. To admit these things—

* * * * * * *

[38] *The Court*: * * *.

* * * * * * *

All right. What do you have to say now on this question of negotiability of these bonds, Mr. Kirkpatrick? I notice all the defendants here seem —

Mr. Kirkpatrick: I think these bonds were negotiable, your Honor. That is the bonds as issued, in form [39] and so forth, were negotiable.

Also, I have no question but what the law, both federal and Pennsylvania, is that a bond continues negotiable after call as to anybody who takes it without notice that it has been called. But the situation is entirely different—and I don't know of any dispute of that in the case—after the man knows that they are called. He then isn't dealing with a negotiable instrument.

That is the law as stated in Brannon, which is quoted I think earlier in that memorandum, and as far as I know that is the law.

That is why I say that the essential fact here is that these people had knowledge that the bonds had been called for redemption. I think that the law is that the bond does not lose its negotiability by reason of having been called, as—

The Court: Take a specific instance. Is there any difference in the rule of law to be applied to the Bank of Indiana, because of the fact that the cashier had notice that the bonds had been called for redemption—

Mr. Kirkpatrick: Oh, yes, I think so.

The Court: Or if he hadn't had notice?

Mr. Kirkpatrick: Very definitely.

The Court: What is the difference?

Mr. Kirkpatrick: I think the law is that a person [40] who takes an instrument after it has been called for redemption, and with notice that it has been called, can not claim the status of a holder in good faith.

The Court: That is still your contention.

Mr. Kirkpatrick: Yes, sir.

Mr. Harrison: May I ask a question, your Honor?

Then is the position of counsel for the plaintiff that a bond is negotiable as to some people and not negotiable as to others?

Mr. Kirkpatrick: Yes.

Mr. Harrison: What authority does he have in mind? I have never read one, and no assistant ever turned one up.

Mr. Kirkpatrick: The question isn't, your Honor, whether or not the bond is negotiable. Yes, it is negotiable. A negotiable instrument depends on certain qualifications. The issue is whether or not these people can claim the status of a holder in due course. And a holder in due course is one who takes before maturity, without knowledge of any defect or infirmity, and for value.

Now, the effect of it is that the courts have said that as to the person who takes after notice of a call, when he knows it is not a question of holding it for investment—there is no necessity of the law merchant having that bond traded in the market place. He cannot [41] claim the status of a holder in due course.

The Court: He only takes for collection.

Mr. Kirkpatrick: That is correct.

Mr. Harrison: I'd like to make doubly plain one further point, that Federal Reserve does not claim to be a holder. In fact, it was not.

Mr. Kirkpatrick: I understand that as to the Federal Reserve. I don't think that is the theory we are arguing as to them.

The Court: I had that in mind particularly with reference to the Bank in Indiana. As I understand that, it may affect their status.

Mr. Miller, Sr.: Your Honor, I would just like to say a word with reference to the Bank in Indiana.

The last statement of opposing counsel hits just exactly the nail on the head as to our position. The Bank of Indiana was simply a conduit through which these bonds passed for redemption. And if we can't show they were innocent and without notice or knowledge, then there ought to be a verdict against them. We can, and we propose to do that.

I think that with reference to—

The Court: Is your position any different, in view of the fact that the bonds had been called, than it would have been had they been bonds that were without any [42] dispute on the market?

Mr. Miller: We will show that the bank had no notice whatever that they had been called—absolutely innocent as to that.

The Court: I understand your cashier testified he new they had been called.

Mr. Miller: It is his burden to prove it. We will show that they did not have notice of the call.

The Court: Of the call of the bonds.

Mr. Miller: Yes.

* * * * * * *

[48] *Mr. Harrison*: There is one question I raised before but I don't believe it has been answered. That is does [49] the plaintiff admit that the Bank in Indiana,

the First National Bank in Indiana was a member of the Federal Reserve System of the Federal Reserve Bank of Cleveland at all times.

Mr. Kirkpatrick: We will admit that. In saying that, I don't admit Mr. Miller's statement here that as a member of the Federal Reserve Bank they occupied the same status as the Federal Reserve Bank.

The Court: It is admitted they are part of the system.

Mr. Miller, Jr.: I think you are misquoting me. I said with respect to the law, that the law applicable was a result of the situation. But I didn't say we are proposing and don't want to propose to occupy the same position as the Federal Reserve Bank.

The Court: You are a member of the system.

Mr. Kirkpatrick: They are a member of the system.

The Court: That is taken care of.

* * * * * * *

Transcript of Trial.

[297] GILBERT S. PARNELL, one of the defendants, having been duly sworn, testified as follows:

* * * * * * *

[306] CROSS EXAMINATION.

By Mr. Kirkpatrick:

Q. Mr. Parnell, I understand that you have lived in Indiana all your life?

A. No, sir. I didn't say that. I don't believe I was asked that question. I lived there since 1908.

Q. Since 1908?
A. That is right.
Q. And you have practiced law there approximately thirty-one years?
A. That is correct.
Q. And you described, I believe, your practice as a general practice, and I think you referred to the ordinary farm country practice or something like that.
A. Well, a country law practice. You've got to do criminal work and civil work, and Orphans Court and divorces and wills and estates and so forth.
Q. And did you do work in the banking field?
A. I am afraid I don't quite understand your question.
Q. Well, did you have occasion to represent—let me be [307]specific. Did you, on occasions, represent the First National Bank in Indiana?
A. I am a director of that bank, but I am not the attorney for it. I have assisted in probably some discussions about legal matters.
Q. And you do attend the Board of Directors meetings, or are generally familiar with banking practices?
A. Well, I attend the Board of Directors meetings, but I am not prepared to say I am generally familiar with all banking practices. I don't think any director is, unless he is actually doing it day by day.
Q. I didn't ask you if you were familiar with all banking practices. I asked if you were generally familiar with banking problems as they come before the board of directors.
A. I, of course, was familiar with whatever problems would come before the board. I hear them discussed.

Q. Now, I think also you testified that in addition to this country law practice, you had been a deputy attorney general of Pennsylvania.

A. At one time.

Q. And in what field did you operate when you were such a deputy attorney general?

A. Well, they used my services in the trial of lawsuits. I tried, probably, oh, four hundred lawsuits for the Department of Justice in thirty-nine counties.

[308] Q. What kind of lawsuits were they?

A. They were concerning the Milk Control law, as a matter of fact.

Q. Is that the only field in which you were operating as deputy attorney general?

A. That is the only work I did, involved injunctions and certain civil and oriminal cases.

Q. Coming down to the circumstances under which you met the defendant, Arthur Rocco, which I think you have testified you first met him in the fall of 1948?

A. I believe I said the late summer or early fall.

Q. Coming down a little later, you saw him in connection with acting—strike that, please. Is it your testimony that on or about September 25, you handled for Mr. Rocco, the redemption of certain Home Owners' Loan Corporation bonds, which are involved in this suit? Is that correct?

A. My recollection is that in September there was nineteen thousand. They were paid, the money came back, and then the latter part of October, he brought thirty-six or thirty-eight thousand in, and asked me to leave them for collection, and I did.

Q. Now, what did you know about the defendant, Arthur Rocco, at that time? How many times previously had you seen him?

Mr. Duggan: That question, in that form, your Honor, is objectionable. I think it ought to be made [309] more specific, if he cares to pursue it.

The Court: Objection overruled. Cross examination of a party.

A. Now, if you will have the question repeated to me, so I know what you are asking.

Q. (The question was read.)

A. Well, I have testified that I knew the father of Arthur Rocco; that he had been in our office, oh, six or eight times at least, on legal business. We rendered legal services to him over a period of fifteen to twenty years. I knew the Rocco family in that way. I knew there was a son, Arthur Rocco, but I did not make his acquaintance until it was either the latter part of August or the first week in September, when he was introduced to me in my office, by one of my law partners. Subsequently, Arthur Rocco and I talked about his plans, his ventures he was thinking of getting into. We rendered certain legal service and counsel and worked for him.

Q. Pardon me. Do I understand that your testimony is that when you first saw him, he was introduced to you by one of your law partners?

A. That is correct.

Q. Who was working for him. Is that correct?

A. That is correct.

Q. What law partner was that?

[310] A. That was Mr. Handler.

Q. Mr. Handler. Is it your testimony that Mr. Handler brought Mr. Rocco to you, and introduced you to him?

A. Mr. Handler introduced—I came into the office, and Mr. Handler and Mr. Rocco were there, and he introduced Mr. Rocco to me, and we discussed about these Tucker propositions, and having a Tucker car, and so —

Q. Just answer my question, please, Mr. Parnell.

A. All right.

Q. Can you fix for me the date when Mr. Handler brought Mr. Rocco to you?

A. I don't think that is a fair statement, Mr. Kirkpatrick. I said that I walked into the office and Mr. Handler and Mr. Rocco were there, and Mr. Handler introduced Mr. Rocco to me.

Q. All right. I will accept that version of it. Can you fix the date of that?

A. As I say, my best recollection would be either the last week of August or the first week of September. I know it was late summer or early fall.

Q. That was well prior to the time when he first brought you bonds of the Home Owners' Loan Corporation?

A. Oh, yes.

Q. Now, at that time, did Mr. Rocco ask you if you could negotiate for him the disposition of certain bonds?

[311] A. Now which time do you refer to?

Q. The first time that you mentioned.

A. I wouldn't say that, no.

Q. September 10?

A. No. It is my recollection we discussed his affairs, and we rendered certain legal counsel advice to him.

Q. When, if you can tell me, did Mr. Rocco first ask you to see if you could sell or otherwise dispose of bonds for him?

A. Well, that was in the month of September, as I recall.

Q. In the early part of September. Is that correct?

A. I believe so, Mr. Kirkpatrick.

Q. And what bonds did he inquire about at that time?

A. Are you talking about the bonds in this case?

Q. I am asking the question of you, Mr. Parnell. What bonds did he ask you to dispose of, when he first saw you?

A. Mr. Rocco asked me to dispose—not dispose of. He asked me to send in for collection, or to get the cash for twenty-five thousand dollars worth, I believe it was, of bonds.

Q. What bonds?

A. Well, those were five thousand United States Government, as I recall, and twenty thousand of West Penn Power bonds, all bearer bonds.

Q. Then your testimony is, if I understand it, that around September [312] 10, Mr. Rocco asked you to negotiate for him or dispose of or send in for redemption, whichever you choose, about twenty thousand of West Penn Power Company bonds. Is that correct?

A. That is correct, Mr. Kirkpatrick.

Q. And also certain treasury bonds. Can you tell me what treasury bonds were involved and the amount of them?

A. Well, I think I just mentioned, it was $5,000 of United States Government bonds.

Q. As to those United States Treasury bonds, Mr. Parnell, what coupons were attached to them, when you saw them on September 10, 1948?

A. Frankly, Mr. Kirkpatrick, I couldn't tell you.

Q. Did you look at the coupons?

A. No, not particularly. I took them down to the bank in the usual course of business, signed the sales order.

Q. Mr. Parnell, I think we will get along a lot better if you just answer my questions without volunteering information.

A. Very well, Mr. Kirkpatrick.

Mr. Duggan: Your Honor, I think the witness is being fair, here. I don't want any implications from the remark of counsel.

The Court: I notice in examination, I think he is answering the questions put to him. I think you will proceed on that theory that he is answering the questions, and you [312-A] don't need to sum up his answer each time, Mr. Kirkpatrick. Let him answer the question and go on with the next one. There has been a summary here after what he has said in each answer.

Mr. Kirkpatrick: All right, sir.

[313] Q. By the way, with whom did you talk when you first went to the bank on this first group of bonds? That is the five thousand dollars of United States Treasury bonds.

A. To the cashier of the bank.

Q. Who is that?

A. Mr. Straitiff.
Q. Or who was that?
A. Mr. Straitiff.
Q. That is Paul J. Straitiff?
A. That is correct.
Q. Is he in the courtroom?
A. He is.
Q. That was true also, was it, with respect to the West Penn Power bonds that you took to the bank on or about September 10?
A. That is correct. I'm not sure of the date.
Q. Can you tell me, Mr. Parnell, what you knew about the family of—strike that. Can you tell me what you knew about the father of Mr. Rocco, at the time you took the first bonds, on September 10, 1948?

Mr. Duggan: Just a minute. What is the purpose of this line of cross examination?

Mr. Kirkpatrick: I don't know whether Mr. Duggan wishes to make an objection or not. He has not yet done so, your Honor.

[314] *Mr. Duggan*: I just want to know the purpose. That is all.

The Court: He is cross examining, as I understand it, and now of course the witness has testified that he knew the family, he knew the father.

However, Mr. Kirkpatrick—you, of course, may cross examine him on his testimony in chief, but this particular question is rather general, what you know about a man's father. It may take him all day to tell you. Let's confine it to specific matters, if you will, and we will get along better. It is a rather broad proposition.

Mr. Kirkpatrick: I will make it as brief as I can. I am inquiring into the circumstances at the time.

The Court: I think you had better confine it.

Mr. Duggan: With that suggestion of the Court, I will withdraw my objection at this time.

The Court: It is objectionable in the sense that it is a rather broad question, perhaps outside the scope of the examination.

Q. Would you answer the question, Mr. Parnell? Perhaps the reporter will read it to you.

A. If you please.

The Court: I say the question is too broad.

Mr. Kirkpatrick: Pardon me, your Honor. I didn't realize that.

[315] *The Court*: I think it had better be rephrased. Therefore the suggestion of the Court is that it be withdrawn.

Q. Did you know the employment in which Mr. Rocco was engaged, when you talked with him on September 10, 1948?

A. Which Rocco?

Q. Mr. Arthur Rocco. I am coming now to the son.

A. As I understand, he had an eastern distributorship for the Tucker car, that it covered a number of eastern states. He was driving one of the five Tucker cars in existence at that time. And he discussed that he was promoting this eastern distributorship for the Tucker car. He also mentioned intending to invest a substantial amount of money in a coal strip-

ping operation. Now, he was driving that Tucker car.

Q. You saw the Tucker car, did you?

A. Yes. On the street.

Q. Did you know anything else concerning his employment or his means of livelihood?

A. Other than he mentioned that he had been in different business ventures. He would take a chance. He would venture, and he made some money, in business propositions.

Q. Did you inquire of him on September 10, 1948, where he obtained the bonds that he was asking you to dispose of?

A. I asked him whether they were—

[316] *Mr. Duggan*: Just a moment.

Mr. Casey: Just a moment. Objected to as not cross examination.

Mr. Duggan: And for the further reason —

The Court: Objection overruled.

Mr. Duggan: And for the further reason, if your Honor please, I can't see that there was any duty or obligation on the defendant, Parnell, to make any inquiry into the source of title of these bonds.

The Court: Objection overruled. Proceed.

A. Now, may I have that question read so I know what I am answering?

Q. (The question was read.)

A. He told me that the bonds were his, and I made no other inquiry.

Gilbert S. Parnell—Cross.

Q. Did you appear, Mr. Parnell, as a witness in a proceedings in this court, at Action No. E-5016?

A. Well, I remember appearing—

Mr. Duggan: Just a minute. That is objected to, if your Honor please, as not cross examination, as incompetent, irrelevant and immaterial, having nothing to do with the issue that is presently pending before this Court.

The Court: I think, gentlemen, we understand the rules, all of us. We have some idea of the rules as to cross examination. I am assuming he has a record of some [317] kind here, that he is using for cross examination.

Mr. Kirkpatrick: I have, your Honor, in my hand the transcript of the proceedings in that and I wish to interrogate the witness about his testimony in that proceeding.

The Court: All right.

Mr. Duggan: Well, your Honor has overruled my objection, so—

The Court: Proceed.

Q. Is it not a fact, Mr. Parnell, that at page 348 of the transcript to which I have referred, you were asked this question? "Now, when he came to you on September 10 and asked you to arrange for the sale of these West Penn Power Company bonds and the United States Treasury bonds, did he tell you where he got them?" And did you not give the following answer? "At that time, Mr. Rocco said the bonds were his. I am not clear that he definitely said

where he got those bonds. I recall something about him saying that he had won some money and some bonds gambling. That is about the extent of my recollection."

A. Well, I remember him telling me—I remember him telling me that the bonds were his, and—

The Court: That is not the question.

Q. That is not the question.

The Court: The question here is put to you [318] specifically, whether you made that answer; having heard that testimony, if you so testified.

A. If it is there, I must have made the answer. But it doesn't give the impression I had of one fact about the matter.

Q. At page 350 of the same transcript, Mr. Parnell, were you not asked this question? Question: "All right. Now then, on September 28, 1948, when he brought you the first group of Home Owners' Loan Corporation bonds, about which you testified, did he tell you where he got those bonds?" And the following answer? Answer: "No more than I have already said. I recall in the transaction that he didn't say definitely where he had gotten them, although there was some conversation that he said they were his. There was some conversation that he won some money and some bonds gambling."

A. If that is there, it must have been my testimony, but it doesn't give the correct impression of one factor in this situation.

Q. Well, again, will you just confine yourself to my questions, please? Then you may explain to what-

ever extent you like. Now, at page 351 of the transcript, were you not asked this question and gave this answer? "Now, on October 20 of 1948, when he brought you the United States Treasury bonds, about which you have already testified, did he say anything to you about them with respect to where he had gotten them?" [319] And the answer: "The same answer, sir."

A. Well, I won't contrary what is there. I do want to explain later one factor.

Q. And were you not asked this question, appearing on page 351 of the transcript, and did you give this answer? "And on October 25 of 1948, when he brought you the second group of Home Owners' Loan Corporation bonds, about which you have already testified, did he say anything to you or tell you as to where he got them? Answer: "My answer would be the same."

A. Well, I won't contrary the record you have.

Mr. Kirkpatrick: Would you read the answer?

A. I will not contrary the record you have.

Q. Pardon me?

A. I will not contrary the record you have.

Q. Proceeding with questions and answers also appearing at page 351, were you asked this question and did you give this answer, referring to the previous answer? "My answer would be the same." Question: "The same as what?" Answer: "What I mean is, I recall repeating that he said the bonds were his. I do not recall that he definitely said where he got any particular bonds, but that he had won some money and some bonds gambling." Do

you recall being asked that question and giving that answer?

A. I recall those questions, but that answer is not correct [320] in one particular.

Q. You may explain later, Mr. Parnell.

The Court: I think he ought to be inquired of now as to whether he gave that answer.

Q. Did you give that answer? The answer I have just read?

A. Well, I didn't mean to leave the impression that answer leaves, I assure you.

Q. Did you give the answer?

A. If it is there, I must have made that answer.

By the Court:

Q. Mr. Parnell, you are a lawyer. I think you understand you are being interrogated. Your answer to that may be yes or no.

A. I will answer, yes, I won't contrary the record.

By Mr. Kirkpatrick:

Q. Proceeding with the questions in the transcript, Mr. Parnell: "Now Mr. Parnell, you have testified that you never had any business transactions of any kind for this defendant, Mr. Rocco, prior to September 10 of 1948, when he brought you the first of the Treasury bonds and the West Penn Power Company bonds. That is right?" Answer: "My testimony is that I never knew this man up until about that time, that he had been consulting other members of the firm, and was brought by them in to me."

A. Well—

[321] Q. Were you asked that question and did you give that answer?

A. I won't deny that that answer is so.

Q. Were you asked this question, appearing at page 352 of the transcript, and did you make this answer? "Now then, you have testified that on October 25 of 1948, he brought you a group of Home Owners' Loan Corporation bonds, which was the last transaction that you mentioned. Now, did you have any further transactions with him, with respect to securities, after October 25, of 1948?" Answer: "Not to my—no bonds. No."

A. That is my recollection.

Q. Were you asked the following question, appearing at page 352 of the transcript? "Did you know Mr. Rocco's occupation?" Answer: "No, I did not, except what he said, that he was engaged in the automobile business. He talked about coal stripping and—"

A. That probably was my answer.

Q. Question:—Were you asked the following question appearing at page 352 of the transcript and did you give the following answer? "Did you know—oh, pardon me. Are you through?" Answer: "Just one thing. It was reported to me he was driving a Tucker car around." Were you asked the following question appearing at page 352 of the transcript, and did you give the following answer, at page 352 and 353? "Did you know where he lived?" Answer: "Not definitely." I [322] assumed he lived around Homer City, where his family lived."

A. I recall an answer of that type.

Mr. Casey: Are you through, Mr. Kirkpatrick, with the questions out of the transcript?

Mr. Kirkpatrick: No, I am not.

Mr. Casey: All right.

Q. Now, would you like to make an explanation as to that testimony, Mr. Parnell?

A. There is one factor that I don't think is quite as I recall it. Mr. Rocco—I didn't get the impression that he won money or bonds in a card game or anything of that nature. My impression was that Mr. Rocco was willing to take a gamble, to venture, to take a chance, and had made a profit on former business transactions, was willing to take a chance in this Tucker agency and strip mining.

Q. Is that your impression, in view of the testimony that he told you that he won some bonds gambling?

A. That is the thing that I don't recall. That is the impression I got from him, what I am telling you now.

Q. But you did testify, did you not, that he told you that he won some bonds gambling?

A. That testimony is there. I don't—I certainly didn't have that impression, when the question was asked and answer given.

[323] *Mr. Kirkpatrick*: Pardon me, Mr. Casey. You inquired. That is all the questions I have on the transcript as to that line, as to what was said.

Mr. Casey: I am presuming, if your Honor please, that this line of cross examination here is to attach the credibility of the witness, that it is not

offered or received as substantive evidence of the fact.

The Court: You mean the questions based on the transcript?

Mr. Casey: Yes.

The Court: The questions and answers.

Mr. Casey: Yes.

The Court: I assume that to be correct.

Mr. Kirkpatrick: That is correct, your Honor.

The Court: It is a question of cross examination of this particular witness. That is all.

* * * * * * *

[328] Q. Now, in the previous transactions, that is to say in connection with the United States Treasury bonds, to the amount of $5,000, on September 10, 1948, and the $20,000 [329] of West Penn Power bonds, on the same date, the amount you received included the interest coupons on those bonds, did it not?

A. It was more than the face.

Q. Now, as to the proceeds of these bonds, did you receive anything on account of the interest coupons?

A. I think I understand your question. Instead of $20,000 West Penn, it was around twenty-one thousand and some odd dollars came in. Is that what you want to know?

Q. That is my recollection of it too. There was an excess over $20,000 and it included accrued interest. Now, I am asking you, did the amount you received on these bonds include accrued interest?

Gilbert S. Parnell—Cross.

A. Frankly, I can't recall. The money came in, and I turned it over.

* * * * * * *

[336] Q. Now, you testified, Mr. Parnell, that you also handled other bonds for Mr. Rocco, namely, on September 10, $5,000 of United States Treasury bonds, and $20,000 of West Penn Power Company bonds. Did you receive checks for the [337] proceeds of those two sales?

A. I have already testified to that.

Mr. Duggan: That is objected to—just a moment, Mr. Parnell.

If your Honor please, we have been rather lenient, I think, with this cross examination.

The Court: Who has been lenient? Who is the "we"?

Mr. Duggan: We have been sitting back here and letting him go.

The Court: The expression, "lenient" I don't think describes the cross examination.

This is cross examination. I don't think that is a proper statement.

Mr. Duggan: What I am getting at, bonds not in these proceedings, it is certainly far afield from a proper inquiry in this case. If I am wrong, say so.

The Court: I think you are wrong.

Mr. Duggan: I usually am, your Honor.

The Court: Proceed.

Gilbert S. Parnell—Cross.

Q. (The pending question was read.)

A. I already answered that I was not in town when the money was obtained from the First National Bank; that my partner, Earl Handler got the money from the First National Bank and turned it over to Mr. Rocco.

Q. Was it turned over in cash, do you know, Mr. Parnell?

[338] A. I think it was, although I wasn't present.

Q. Do you have the check by which the proceeds of those first bonds were made payable?

A. Well, I wouldn't have that check. The bank would have the check.

Mr. Kirkpatrick: I call on the attorneys for the bank to produce such check, if they have it.

The Court: Now just a minute. That is collateral.

Mr. Miller, Jr.: That will be admitted.

The Court: We get to a point where we stop. That is collateral. He has testified it was handled in the same way.

Mr. Kirkpatrick: All right, your Honor, I will not pursue that.

Q. Now, with respect to the proceeds of the two checks, covering the Home Owners' Loan Corporation bonds, Mr. Parnell, Plaintiff's Exhibit 15 and Plaintiff's Exhibit 18, is it your testimony that all of the proceeds of those checks and all of the proceeds of the other bond sales or redemptions were delivered to Mr. Rocco, except for $650?

A. That is correct.

The Court: I think we will recess at this time for fifteen minutes.

(A recess was taken at this time.)

(Note: Change of reporters at this time.)

[339] *Mr. Kirkpatrick*: If the Court please, last week I believe it was, the witness was served with a subpoena by plaintiff in this case, and I ask him now to produce those documents. We have not had an opportunity to examine them as yet. I do not know what the witness has produced or has available with respect to it, but I would like to interrogate him now with respect to that matter.

Mr. Duggan: I know we have some. I don't know what it is, Your Honor. But whatever we have we will produce, of course.

By Mr. Kirkpatrick:

Q. Prior to our examination with respect to the documents, Mr. Parnell,—did you or your firm continue to represent Mr. Rocco after October 25, 1948, or to do work for him?

A. Yes.

Q. Did he ever to your knowledge establish the Tucker agencies to which you referred?

A. I heard that he contacted different people—that is subsequent to this—and, of course, eventually the Tucker car at that time—

Q. Now, I just asked you, Mr. Parnell,—

A. All right.

Q. —to your knowledge did he ever establish an agency?

A. It was my understanding that he had.

Q. To your own knowledge, did he ever go in the coal stripping [340] business?

A. I can't say that I can answer that, because I don't know.

Q. In the former proceedings with respect to which I interrogated you did you give any testimony as to his mentioning sums of sixty or seventy thousand dollars or any sums in connection with going into these businesses?

Mr. Duggan: Just a minute. If Your Honor please, I think that the proper inquiry would be whether or not he was asked or queried in connection with this item that he is being interrogated about now. If he wasn't asked the question, naturally he wouldn't make an answer. So it is in that respect unfair.

The Court: I think that is correct, Mr. Duggan. I am glad to agree with you once. All right. Let's proceed.

Q. Now, the $650 total that you received from Mr. Rocco, was that for the work you did in connection with disposing of these bonds, or for other work?

A. I testified that we did other work for about $150 worth and that the $500 was a retainer fee—we considered him a valuable client—in the way of future services, and we continued to represent him.

By Mr. Duggan:

Q. Mr. Parnell—pardon me—I am sure some of these jurors can't hear you, because I am having trouble.

A. All right. I will talk loud.

[341] Q. Please.

By Mr. Kirkpatrick:

Q. You did not receive and your law firm did not receive any other sum or sums then from Mr. Rocco?

A. I have answered that question several times. No.

* * * * * * *

[349] Q. Now, Mr. Parnell, you testified in response to questions by Mr. Duggan that some four and one-half months after the transaction in these bonds—I am referring to the Home Owners' Loan bonds—you learned for the first time of any de-[350]fect in the bonds. Would you tell me the circumstances and what you learned at that time?

A. Mr. Kirkpatrick, as I recall, some notice came into the bank, and I was called down there, and that is when I learned about it, as I recall.

Q. Well, who called you? Were you called to the bank, as you just started to say—

A. I can't tell you whether it was the president or the cashier or the attorney, but they were all there at one time or another, when we talked this matter over.

Q. Who was the attorney?

A. Well, the attorney for the bank was Mr. D. R. Tomb.

Q. Now, will you continue with your answer and tell me the circumstances and what notice you had of the defect at that time?

A. Well, as I say, Mr. Kirkpatrick, the word came back that there was something wrong with these bonds, and I was called down to the bank at that time, and that is when I learned it.

Q. Well now, can't you be more specific, Mr. Parnell?
A. About what?
Q. You say that there came a time four and a half months later, which I assume would be around January or February of '49, when you learned something about the title to the bonds being defective. Now I am asking you what you learned at that time. What had happened?

[351] *Mr. Miller, Jr.*: If the Court please, I have refrained from objecting here, but I think this is entirely irrelevant. This is a matter after the time of the transaction—

The Court: He has testified in chief, he has testified in response to his own counsel, as to when he first learned about it.

Mr. Miller, Jr.: That is correct, your Honor. He has a right to—but what he said or what went on, I mean, is entirely irrelevant.

The Court: Generally, I think it is admissible. We will permit it. Overruled. Proceed.

A. Would somebody please read the question I am supposed to answer?
Q. (Question read.)
A. All right. Now, as I testified before, word came to the bank that there was some question about these bonds—
Q. About which bonds?
A. Mr. Kirkpatrick, I can't tell you which ones. But I was called down to the bank, and, as I understood, the bonds were missing—it was something like these fifty-seven thousand dollars worth—from the Bank of America. And when that fact was made known

we naturally were quite alarmed and quite confounded about it; it was totally unexpected.

Q. You say you were informed that the bonds were missing, or something. I don't understand you. Can't you tell me defin-[352]itely what bonds — when word first came back to the bank with respect to the bonds, you have testified that you took to the bank $20,000 of West Penn Power bonds, $5,000 United States Treasury bonds, on September 10.

A. That's correct.

Q. You have testified that on these two occasions, in September and October, you took an aggregate of $57,600 of Home Owners' Loan Corporation bonds. Now, first as to the question of the date when you learned of it, how do you fix the date as approximately four and a half months later?

A. As I recall, it was after the first of the year, as I have testified before, in January or February.

Q. All right. In January or February, then—

A. Of '49.

Q. —of 1949?

A. That's right.

Q. —your impression is that you learned of it at a meeting which was attended by Mr. Tomb and yourself and some officer of the bank. Is that correct?

A. I did not so testify. I said as a fact that I was called down at the bank, that the bank had gotten word there was some question about these bonds, and then there was meetings with various officials of the bank. I can't tell you exactly who was there at any given time, but—

Q. Well, let's start with the first meeting.

[353] A. Please,—please let me complete my answer.

Q. Certainly.

A. Then — these West Penn bonds had been sold through Hemphill Noyes to some customer. Then when the coupons were sent in to the West Penn Power Company, then it became known that they had been—turned up missing in a brokerage firm in New York; and then, according to the rule of the New York Stock Exchange, it was necessary for Hemphill Noyes to make a call on the First National Bank. They made good, I made good to the bank. Now, that's the circumstances, sir.

Q. Now you have related it to the West Penn Power bonds. Now, when did the bank receive notice with respect to the West Penn Power bonds? —according to your best recollection, Mr. Parnell. That's all I am asking for.

A. I am trying to give you—I have nothing to—

Mr. Casey: Now, if the Court please, I object to this line of cross examination. I ask that the preceding answer of the witness be stricken from the record, as not proper cross examination, and the jury be instructed to disregard it. The issue here is the two paragraphs in the complaint as to H.O.L.C. bonds. And I don't see any materiality or any proper cross examination as to testimony in chief as to notice pertaining to any other bonds. So therefore we would be trying another case.

The Court: Well, the issue is good faith.

[354] *The Witness*: That's correct.

The Court: The issue is good faith, and anything bearing on the question whether or not he handled these bonds in a certain manner bears on

the question of his good faith. We will permit the question. The objection is overruled. I understand he has answered the question though, hasn't he?

Mr. Kirkpatrick: I thought he had, your Honor. I don't know where the objection came in. Perhaps we had better ask him—

The Court: Well, Mr. Casey made a motion to strike his answer. That motion is overruled. So proceed.

* * * * * * *

[358] Q. Did any agent of the Federal Bureau of Investigation ever come to you to make inquiry regarding these bonds?

Mr. Duggan: That is objected to, Your Honor, as incompetent and irrelevant and not cross examination.

Mr. Kirkpatrick: It goes directly, Your Honor,—

The Court: Well, I am going to permit that answer, whether he did or not.

A. Yes.

Q. When did he first come?

A. Mr. Kirkpatrick, I can't give you that date. It was in and around the time of the happening of these things. He was investigating this matter.

Q. Would you say that he came before or after you were called to the bank?

A. That would be after.

Q. Not until after?

A. That is my recollection.

* * * * * * *

[457] ARTHUR ANTHONY ROCCO, a defendant, called by the plaintiff in rebuttal, having been previously sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Kirkpatrick:

Q. Mr. Rocco, I would like to inquire first concerning the amount of the proceeds of the Home Owners' Loan Corporation, which are involved in this case and which you received. I am referring specifically now, at this time, to the proceeds of a check which is in evidence as Plaintiff's Exhibit No. 15, being a check in the amount of $19,590, and the proceeds of another check, being a check dated October 28, 1948, in the amount of $37,980, that check being Plaintiff's Exhibit No. 18.

A. Are you asking me if I ever received $57,000? Is that it?

Q. Yes.

A. I never received $57,000.

Q. Can you tell me how and under what circumstances such part of the proceeds, if any of those checks, were delivered to you?

[458] A. Well, I have no records. I have never kept any records. I did everything in cash. And I—I would say out of the total amount of $57,000, I received in the neighborhood of fifty-one or fifty-two thousand dollars.

Q. Out of the total of fifty-seven, represented by these two checks?

A. That's right.

Q. Now, can you tell me, Mr. Rocco, whether or not Mr.

Parnell received a portion in excess of $650 out of other bonds, which he negotiated for you?

Mr. Duggan: That is objected to as incompetent, irrelevant and immaterial and not within the purpose for which it is offered, and generally as having no probative value as to the bonds mentioned in this proceeding.

The Court: The difficulty with the objection is that the Court recalls Mr. Parnell's testimony that he received a total of $650 in all these transactions.

Mr. Duggan: I think that is right.

The Court: So this man can testify if it is rebuttal, and I assume it will be, with regard to any amount in excess of that, that Mr. Parnell received, if he did receive it.

Objection overruled.

A. May I hear the question?

The Court: I think first you had better inquire as to [459] whether he heard Mr. Parnell's testimony.

Q. Did you hear the testimony of Mr. Parnell with respect to receiving a total of $650?

A. I did.

Q. Now, may I ask the reporter to read again the previous question? (The previous question was read as follows: "Now, can you tell me, Mr. Rocco, whether or not Mr. Parnell received a portion in excess of $650 out of other bonds, which he negotiated for you?")

The Court: Out of all the bonds.

Q. Out of all the bonds. I will ask that.
A. He did.
Q. Can you tell me exactly or approximately how much Mr. Parnell received out of the proceeds of all the bonds he negotiated for you?
A. That is the Home Owners' Loan bonds?
Q. Home Owners' Loan bonds, the treasury bonds, the West Penn Power bonds, all bonds that he negotiated for you.

Mr. Casey: If the Court please, we are going a little far afield here, on grounds which concern me. I understood the offer was that the witness would be produced in rebuttal to contradict Mr. Parnell as to receiving—

The Court: I think it should be restricted to three transactions. I don't know what else took place. Mr. Parnell's testimony is as to three transactions, if the [460] Court recalls.

Mr. Kirkpatrick: That is right. I will restrict it to the three transactions.

The Court: The witness heard it, so he can be asked directly, without recalling his attention to any specific bond.

A. I think I mentioned the fact, a few questions ago, that I received out of the fifty-seven thousand, fifty-one or fifty-two thousand, to the best of my knowledge.
Q. In that case, you were referring to the Home Owners' Loan Corporation bonds only, were you not, Mr. Rocco?
A. That's right.

Q. Now, referring not only to those bonds, but the West Penn Power bonds, in the amount of $20,000, and—

Mr. Kirkpatrick: I am uncertain, without looking at the transcript, your Honor, whether Mr. Parnell referred to $5,000—I will ask him generally this point.

The Court: It seems to me like a simple matter, because as I recall his testimony, he said the three transactions, one on September 10, 28th of September, and the one in October. That is the way Mr. Parnell testified. Get them by date, the three transactions, and see what he says.

Q. Can you tell me now what was received or retained by Mr. Parnell, out of the three transactions; namely, the West Penn Power bonds and the $5,000—

[461] *Mr. Duggan*: Wait a minute.

The Court: Three transactions, covering three dates.

Q. On the three dates?

A. Well, as I have said, I have no—I have no books to fall back on, and I wouldn't know—I wouldn't know and it has been quite a while. I know I gave him—I sat here and listened to his testimony to $650. I know it was in excess to that. But to give a specific amount, with—I couldn't give you a specific amount, outside of I do know, to that, like I testified, on that Home Owners' Loan bonds, out of $57,000, I received fifty-one or fifty-two thousand, in that neighborhood. That is as specific as I can get. I have nothing to fall back on.

Q. Now, did you receive the entire proceeds and then

pay that back to Mr. Parnell, or what was the procedure?

A. Well, I couldn't answer that question truthfully either, as to whether he took his out, or I gave him his. I do not remember.

Q. Did you go with him to the bank when these two checks, Exhibits 15 and 18, which relate to the Home Owners' Loan Corporation bonds, were cashed?

A. Why, I don't think I've been in the First National Bank more than once in my life, and that was some years before that. I never was in the First National Bank.

Q. Where—

[462] *Mr. Duggan*: Would you keep your voice up please, Mr. Rocco, so we can hear you back here?

Q. Where were the payments made to Mr. Parnell?

A. I would have no idea where the payments were made to Mr. Parnell. I was paid in Mr. Parnell's office.

Q. Pardon me. Then the amount of money which Mr. Parnell retained, though, did he retain it, or did you—did he retain a portion of the money and give you the balance, or did he give you all of the proceeds and then you paid him back? That is what I am trying to get at.

A. Well, I couldn't truthfully say. I wouldn't know how it did happen—it's been so long ago, whether he paid me and I paid him back. I know I got my money, that I have stated.

Q. Did you receive all the money you were to receive from Mr. Parnell from the proceeds of the disposition of these bonds?

Mr. Casey: That is objected to as not rebuttal.

The Court: Sustained. He has testified to the rebuttal part of it.

This is rebuttal.

Mr. Kirkpatrick: That is all the questions I have, your Honor.

The Court: Any cross examination?

Mr. Duggan: I have no questions, your Honor.

Mr. Miller, Jr.: No questions.

Mr. Casey: That is all, sir.

[fol. 56] UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION

vs.

ARTHUR A. ROCCO, GILBERT S. PARNELL, FIRST NATIONAL BANK IN INDIANA and Federal Reserve Bank of Cleveland

No. 11,526, FIRST NATIONAL BANK IN INDIANA, Appellant

No. 11,533, BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, Appellant

No. 11,536, GILBERT S. PARNELL, Appellant

ORDER SETTING CASES DOWN FOR REARGUMENT EN BANC—May 26, 1955

Present: Biggs, Chief Judge, and Maris, Goodrich, McLaughlin, Kalodner, Staley and Hastie, Circuit Judges

It is ordered that the above-entitled cases be set down for rehearing before the court en banc on Monday, June 6, 1955.

By the Court, Goodrich, Circuit Judge.

May 26, 1955.

Received and filed May 26, 1955. Ida O. Creskoff, Clerk.

[fol. 57] UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. 11,526, 11,533 and 11,536

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION

v.

ARTHUR A. ROCCO, GILBERT S. PARNELL, FIRST NATIONAL BANK IN INDIANA and Federal Reserve Bank of Cleveland

FIRST NATIONAL BANK IN INDIANA, Appellant in No. 11,526

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, Appellant in No. 11,533

GILBERT S. PARNELL, Appellant in No. 11,536

Appeals from Judgments of the United States District Court for the Western District of Pennsylvania

Argued April 19, 1955

Reargued June 6, 1955

Before Biggs, Chief Judge, Maris, Goodrich, McLaughlin, Kalodner, Staley, and Hastie, Circuit Judges

OPINION OF THE COURT—Filed October 12, 1955

By STALEY, Circuit Judge:

This was an action brought by the plaintiff against four defendants to recover the value of certain bonds which al- [fol. 58] legedly were stolen from the bank. These bonds came into the possession of defendant Rocco. They were presented by defendant Parnell, on behalf of Rocco, for collection to the First National Bank in Indiana, Indiana, Pennsylvania, and by it forwarded to the Federal Reserve Bank of Cleveland. This bank cashed the bonds, paid the First National Bank in Indiana and it, in turn, issued a cashier's check to Parnell. The check was cashed, and the money turned over to Rocco.[1] The Federal Reserve Bank

[1] There were actually two such transactions, one in September, 1948, and the other in October, 1948.

of Cleveland was dropped out of the litigation at the end of plaintiff's case, and neither side makes point of this fact on appeal. Therefore, we are not concerned with the correctness or incorrectness of that ruling. Rocco did not appeal.[2] The two appellants, therefore, are the lawyer (Parnell) who presented the bonds to the First National Bank in Indiana and that bank itself.

These bonds were bearer bonds issued by the Home Owners' Loan Corporation with both principal and interest guaranteed by the United States. The issue date was May 1, 1934. The maturity date was May 1, 1952. There were interest coupons attached calling for interest payments semi-annually.

The trial was conducted on the theory that the rights of the parties and the burden of proof were governed by state rather than federal law since the case was considered an ordinary, garden variety, diversity of citizenship case. The appellants urge that federal law, under which they claim significantly different results would be reached, should have governed the case.

We think that the doctrine of Clearfield Trust Co. v. United States, 318 U. S. 363 (1943), affirming this Circuit, 130 F. 2d 93 (C. A. 3, 1942), is controlling and compels the [fol. 59] conclusion that where United States bonds are concerned, we must look to federal law to determine not only the nature of the obligations, rights, and duties of the United States as a party, but also the rights and duties of holders and transferees of such bonds among each other.

In the Clearfield case, the Supreme Court said: "The rights and duties of the United States on commercial paper which it issues are governed by federal rather than local law," and the reason expressed by the court was: "The issuance of commercial paper by the United States is on a vast scale and transactions in that paper from issuance to payment will commonly occur in several states. The

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[2] Rocco was also prosecuted criminally and was convicted for transporting in interstate commerce and for selling stolen securities. See United States v. Rocco, 99 F. Supp. 746 (W. D. Pa., 1951), aff'd per curiam, 193 F. 2d 1008 (C. A. 3, 1952).

application of state law, even without the conflict of laws rules of the forum, would subject the rights and duties of the United States to exceptional uncertainty. It would lead to great diversity in results by making identical transactions subject to the vagaries of the laws of the several states. The desirability of a uniform rule is plain. And while the federal law merchant, developed for about a century under the regime of Swift v. Tyson, 16 Pet. 1, represented general commercial law rather than a choice of a federal rule designed to protect a federal right, it nevertheless stands as a convenient source of reference for fashioning federal rules applicable to these federal questions." 318 U. S. at p. 367.

Those reasons are just as cogent for the application of federal law to the determination of the rights of transferees to these government bonds, which rights flow naturally from a determination of the nature and character of the bonds. Whether or not the United States is a party to a dispute concerning transactions in government bonds should not make a difference in the applicable law. The desirability of having uniformity of results in a determination of the rights of transferees of such bonds is just as important as having uniformity in a determination of the rights and liabilities of the United States, a party to the original obligation, so that the vast amounts of government [fol. 60] bonds presently in circulation can be free of the myriad of doubts which would arise if the rights of the transferees must be determined by the several and diverse laws of the states, for then a purchaser of such bonds would, of necessity, in each case have to make inquiry as to the prior route taken by the bonds.

In Metropolitan Bank v. United States, 323 U. S. 454 (1945), at page 456, the Supreme Court in commenting on the Clearfield case said: "Our conclusion was that legal questions involved in controversies over such commercial papers are to be resolved by the application of federal rather than local law and that, in the absence of an applicable Act of Congress, federal courts must fashion the governing rules." See American Houses, Inc. v. Schneider, 211 F. 2d 881 (C. A. 3, 1954); United States v. Dauphin Deposit Trust Co., 50 F. Supp. 73 (M. D. Pa. 1943); Beutel's

Brannan, Neg. Ins. Law 108 (7th ed.). We think that federal law should govern in the instant case.

The appellants urge that under federal law the purchaser of coupon bonds before due, without notice and in good faith, is unaffected by want of title in the seller, and the burden of proof in regard to notice and good faith is on the claimant of the bonds as against the purchaser. They further urge that the plaintiff in this case did not sustain its burden of proof.

Under federal law, we think the established rule is as the appellants say. In Murray v. Lardner, 2 Wall. 110 (1864), the rule was enunciated that the purchaser of coupon bonds before due, without notice and in good faith, is unaffected by want of title in the seller, and the *burden of proof in regard to notice and want of good faith* is on the claimant of the bonds as against the purchaser. This was repeated and reaffirmed in Texas v. White, 7 Wall. 700 (1868), and was apparently reaffirmed in Morgan v. United States, 113 U. S. 476 (1885). See Swift v. Tyson, 16 Pet. 1, 15 (1842) (subsequently overruled on other grounds); Presidio County v. Noel-Young Bond Co., 212 U. S. 58, 70 (1909). [fol. 61] Murray v. Lardner has never been overruled and has been referred to by the Supreme Court as late as 1935. See Graham v. White-Phillips Co., 296 U. S. 27, 32 (1935); Marine Bank v. Kalt-Zimmers Co., 293 U. S. 357, 364 (1934). See also 11 C. J. S. Bonds 654g, wherein it is pointed out that the federal law (and the common law) and the law under the Negotiable Instruments Act in many states are not in accord. It was incumbent upon the plaintiff to sustain its burden of proving notice and want of good faith on the part of the defendants, and whether or not it did so is our next question.

Our first problem is with the effect of the fact that the bonds had been called for redemption on May 1, 1944. By the time they came into the hands of these defendants in 1948, there were interest coupons attached to the bonds which, by their terms, were overdue. It appears that there was nothing on the face of these bonds to indicate that they had been called. Although there is no evidence that Parnell knew of the call, it is clear that the bank did. It also appears that the effect of the calling of the

bonds was to stop the liability of the obligor to pay interest on them.[3]

Was this "overdue paper"? If the paper was overdue on its face, the defendants did not acquire the bonds in good faith and would be liable for conversion under the same circumstances that one would be liable for conversion of any other chattel.

As said above, we think federal law controls the nature of the obligations embodied in these instruments. There is one Supreme Court decision which deals at length and thoroughly with the problem of the rights of one who acquires a called negotiable government bond for value, [fol. 62] knowing of the call. That case is Morgan v. United States, 113 U.S. 476 (1885), and we think it is controlling here. In Morgan, after discussing the reasons why the acceptance of overdue paper affects good faith, the Court said, at pages 500-501:

> "No such presumption, in our opinion, arises to affect the title of a holder of the bonds of the United States, such as those now in question, acquired by a bona fide purchaser for value prior to the date fixed in the bonds themselves for their ultimate payment; for, as we have already shown, the only change in the original effect of the contract by the exercise of the right of earlier redemption is to stop the obligation to pay future interest. And as against one choosing for any purpose of his own to retain his bond as a continuing security for the value it always represents, having impressed upon it by the law of its creation the faculty of passing from hand to hand

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[3] 31 Code Fed. Regs. § 307.4 (1949). "*Interest.* Bonds and other interest-bearing securities will cease to bear interest on the date of their maturity, unless they have been called for redemption before their maturity in accordance with their terms, in which case they will cease to bear interest on the date fixed for redemption in the call. No interest can accrue after a security has become due and payable, whether at maturity or by virtue of a call for redemption before maturity."

as money, and therefore just as useful in the pursuits of trade and the exchanges of commerce and banking as so much money in the form of coin or bank notes, and more convenient because more portable, no such presumption can be entertained on the ground that its continued circulation is not in the due course of business, that it has fully performed all its intended functions, and that it has been in any sense dishonored by a refusal on the part of the obligor to fulfil its obligation. On the contrary, supposing the purchaser bound to know, what in fact does not appear on its face, that the bond has been called for redemption under penalty of a stoppage of interest after three months, the very notice, which, it is said, discredits his title, is in fact an advertisement, not that the maker has any ground to refuse payment, but that the previous holder preferred to hold the security for the money rather than to accept the money which it represents."

[fol. 63] The Court did not think that the lapse of a long period between a call and a purchase affects the purchaser's rights, saying, at pages 501-502:

". . . In reference to the bonds involved in this litigation, we have no hesitation in saying that, at the time the title of the purchasers was acquired, no unreasonable length of time had elapsed after the maturity of the call. On the contrary, we think any holder had a right, without prejudice, except as to loss of interest, *to wait without demand for the whole period*, at the expiration of which the bond was unconditionally payable.

"The fact that interest was to cease to accrue three months after the date of call, had no tendency to discredit the bond or affect the title of a bona fide purchaser for value in the due course of trade. . . ." (Emphasis supplied.)

The Morgan case has never been overruled, nor do we think that it has been diluted by Smyth v. United States, 302 U.S. 329 (1937). In the Smyth case, the only ques-

tion involved was, "Was a notice of call issued by the Secretary of the Treasury for the redemption of Liberty Loan bonds effective to terminate the running of interest on the bonds from the designated redemption date?" Smyth held that the call terminated interest, and this decision is in full accord with Morgan. We do not think that the Smyth case should be read so as to impair the reasoning and decision in Morgan, especially since Smyth was not concerned with the Morgan problem, and nowhere is Morgan referred to in the Smyth opinion.

Thus, in the instant case, the facts that the bonds had been called and that the Indiana bank knew of the call cannot be considered evidence of bad faith. If the plain-[fol. 64] tiff is to prevail, it must be because there is other evidence, aside from the fact of call, which will sustain its burden of proving notice and bad faith.

As far as the Indiana bank is concerned, we do not think there was any evidence of bad faith. There is nothing in the evidence presented by the plaintiff to evidence bad faith on the part of the Indiana bank, but the plaintiff relies upon evidence which was elicited from defense witnesses. There was evidence that the Indiana bank paid Parnell in bills of small denominations, the largest being one hundred dollar bills. There was also evidence that when the Indiana bank received credit from the Federal Reserve Bank for the bonds, a cashier telephoned to inform Parnell that the bonds had been cashed. In all these transactions, according to the plaintiff, Parnell acted for an undisclosed principal. These facts are all that plaintiff can rely on to sustain its burden of proof. Accepting these facts as we have outlined them, we do not think they show any bad faith on the part of the Indiana bank.

But an examination of the record does not disclose that Parnell specifically asked for small denominations, and there is uncontradicted testimony by the cashier that the Indiana bank never carried on hand bills of a larger denomination than one hundred dollars. The evidence of small bills, of course, would be immaterial on the issue of good faith in accepting the first bonds. Even assuming the Indiana bank had larger bills and Parnell specifi-

cally requested small bills, the bank would not know this "suspicious" circumstance until after it had given Parnell the cashier's check. As to the second transaction, we must remember that almost a month had passed since the first transaction without any notice from the Federal Reserve Bank or anyone else that the first bonds were stolen bonds. As for the telephone calls from the cashier, the record does not at all indicate that the calls were special calls made directly to Parnell personally in some [fol. 65] secretive manner. In fact, the record indicates that Parnell's office received a call in September, when he was out of town, in connection with the cashing of certain bonds. In any event, it is difficult to see how a cashier's calls to a customer, who was also a director of the bank, awaiting payment of bonds indicates lack of good faith on the part of the Indiana bank. Many bank customers would demand such service.

In short, plaintiff failed to sustain its burden of proof so far as the Indiana bank was concerned.

As to Parnell, however, the story is different. There was evidence which, if believed, would sustain the jury's verdict that he acted in bad faith. From Rocco's testimony, the jury could have inferred that Parnell's fee for cashing the bonds was extremely high, being approximately ten per cent of the value of the bonds. A fee of five or six thousand dollars for the mere transmittal of bonds for redemption would be sufficient evidence from which a jury could find bad faith.

But, even though there was evidence from which the jury could have found a lack of good faith on the part of Parnell, the jury's verdict cannot stand because of improper instructions. In its charge, the district court categorically told the jury that the burden of proving lack of notice and want of good faith was upon the Indiana bank and Parnell. As we have heretofore indicated, the burden of proof was upon the claimant-plaintiff. There is no doubt that the trial court was aware that it was Parnell's contention that federal law should govern the case and consequently the burden of proof was upon the plaintiff as to notice and good faith. As early as the pre-trial conference, the defendants vigorously asserted

this, and they renewed their contention on various occasions during the trial. Under these circumstances, although no specific objection was voiced to the charge, we nevertheless can and will take note of such a fundamental error and reverse.

[fol. 66] There is no need to consider other points raised by the defendants-appellants.

The plaintiff has also appealed in this case, claiming that the judgments should be increased to include interest from the time of the conversion by each defendant until the judgment was returned. The judge left the matter of interest to the jury's discretion. Three separate judgments were entered, each for $57,600, one against Rocco, one against Parnell, and one against the Indiana bank. Plaintiff's judgment against Rocco stands because Rocco has not appealed. As to the Rocco judgment, the plaintiff's request for interest must be rejected. The plaintiff cannot now complain about the judge's instructions to the jury concerning interest. It did not complain of the instruction when given. In fact, plaintiff acquiesced in it. Just after the judge had charged in the matter of interest, he asked counsel whether they desired additional instructions or correction in the instructions given. Plaintiff's counsel said he desired no additional instructions and "has no correction."

We think that the judge's instructions became the law of the case, and the plaintiff cannot now offer objection.

The interest question is moot re plaintiff's appeal from the judgments entered against Parnell and the Indiana bank, since those judgments will be reversed, but since the same problem may arise again, we note that, for reasons given earlier in this opinion, interest questions along with all other questions involving government bonds should be governed by federal rather than state law.

The judgment in No. 11,526 will be reversed, and the cause will be remanded with instructions that judgment be entered for the First National Bank in Indiana. In No. 11,536, the judgment will be reversed and the cause remanded with instructions that a new trial be granted to Parnell. In No. 11,533, the judgment against Rocco will be affirmed.

[fol. 67] GOODRICH, Circuit Judge, dissenting:

There is a sharp distinction made in the law between the law which governs the nature of a contract, including its assignability, and the law which is looked to to determine whether a given transaction assigns the contractual rights. The latter question is determined by the law of place of assignment; the former by the place of contracting. See Restatement, Conflict of Laws, §§ 349 and following.

We think that analogy is in point here and marks the line where Clearfield Trust Company v. United States, 318 U. S. 363 (1943) is applicable and where it is not.

We think that the Clearfield Trust case has this much to do with the set of facts here and no more. This was a bond issued by the United States or by a government corporation under its authority. The nature of the obligation, we think, is controlled by United States law and the rights and duties of the United States as a party is a matter for federal legislation and regulations. We do not think that the rights of transferees among each other in a transaction taking place in Pennsylvania is a matter of federal law at all but is governed by the law of the state where the operative facts occurred. See Clearfield Trust Co. v. United States, *supra* at 367. See also United States v. Guaranty Trust Co., 293 U. S. 340, 346 (1934).

Our analysis of the case, then, would proceed as follows:

I. Were These Bonds Overdue?

The first question in the case has to do with the effect of the fact that these bonds had been called for redemption on May 1, 1944. By the time they came into the hands of these defendants in 1948 there were interest coupons attached to the bonds which by their terms were overdue. It appears that there was nothing on the face of these bonds to indicate that they had been called. It also appears that [fol. 68] the effect of the calling of the bonds was to stop the liability of the obligor to pay interest on them.[1]

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[1] 31 C. F. R. § 307.4 (1949). "*Interest.* Bonds and other interest-bearing securities will cease to bear interest on the date of their maturity, unless they have been called for re-

Was this "overdue paper"? If the paper was overdue, it is quite clear that there can be no such thing as a holder in due course[2] and that anyone who interferes with the rights of the true owner is liable for conversion under the same circumstances that he would be liable for conversion of any other chattel.[3] Overdue paper is "negotiable" in the sense that it can be transferred, if bearer paper, by transfer of possession, if order paper, by endorsement and delivery, in the same way as if it were not overdue. But one acquires under those circumstances no special rights from the fact that he is dealing with negotiable paper except that if he takes from a person who is a holder in due course he succeeds to that person's rights. Of course, so does one who takes a chattel from another.[4]

As said above, we think federal law controls the nature of the obligation embodied in these instruments. There is one Supreme Court decision which deals at length and thoroughly wtih the problem of the rights of one who acquires a called negotiable bond for value and in good faith but shortly after the call has been made. That case is Morgan v. United States, 113 U. S. 476 (1885). The Court

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demption before their maturity in accordance with their terms, in which case they will cease to bear interest on the date fixed for redemption in the call. No interest can accrue after a security has become due and payable, whether at maturity or by virtue of a call for redemption before maturity."

[2] Negotiable Instruments Law § 52(2); Pa. Stat. Ann. tit. 56, § 132(2) (1930). We cite the Pennsylvania statute as it existed before the adoption of the Uniform Commercial Code in this State. Our operative facts here occurred in 1948.

[3] Negotiable Instruments Law § 58; Pa. Stat. Ann. tit. 56, § 138 (1930); Britton, Bills and Notes, § 155 (1943); Lindsley v. First Nat. Bank of Philadelphia, 325 Pa. 393, 190 Atl. 876 (1937); Kittredge v. Grannis, 244 N. Y. 168, 155 N. E. 88 (1926).

[4] Negotiable Instruments Law § 58; Pa. Stat. Ann. tit. 56, § 138 (1930); Chafee, Rights in Overdue Paper, 31 Harv. L. Rev. 1104, 1110 (1918); Britton, *supra*, § 123 (1943).

there said that (498) "the bond becomes, after the maturity [fol. 69] of a call for redemption, payable at the option of the holder on demand, but without future interest . . . it cannot be, that the legal effect of such a call for the purpose of redemption is the same as if the bond had been originally framed as an obligation to pay absolutely on a day previously fixed." [5]

In Smyth v. United States, 302 U. S. 329 (1937), Mr. Justice Cardozo stated categorically that redemption clauses in Government bonds "are provisions for the acceleration of maturity at the pleasure of the Government, and upon publication of the notice for the period stated in the bonds the new date became substituted for the old one as if there from the beginning." 302 U. S. at 353.[6]

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[5] The Court concluded that the bonds were "not overdue, in the commercial sense, till [*sic*] after the day of unconditional payment." 113 U. S. at 499. The Morgan case was cited and followed in Pflueger v. Broadway Trust & Savings Bank, 265 Ill. App. 569, 595 (1931). The Supreme Court of Illinois affirmed the decision on appeal on the basis of the Morgan case, but also pointed out that there was no evidence of notice of the call for redemption. 351 Ill. 170, 184 N. E. 318 (1932).

[6] See also Britton, *supra*, § 23 (1943) ("From the business standpoint the accelerating clause is used for two purposes: (1) to permit the obligor to pay the instrument before the arrival of the ultimate date of maturity, or (2) . . . The former is well illustrated by the redeemable or callable bond and promissory notes of like nature."); Beutel's Brannan Negotiable Instruments Law, 277 (7th ed., 1948) (" 'This bond is subject to redemption at 105' does not render the instrument non-negotiable; it is a mere acceleration clause." Citing Sturgis Nat. Bank v. Harris Trust & Savings Bank, 351 Ill. 465, 184 N. E. 589 (1933) which only holds that a redemption clause does not make the instrument non-negotiable.); Bank of California v. National City Co., 138 Wash. 517, 244 Pac. 690 (1926) (A redemption clause "has no other legal effect in this respect

To us it seems apparent that the language of the Supreme Court in 1937 differs quite materially from the language of the Supreme Court in 1885. If the Cardozo language is taken literally the bonds which we deal with in this case were certainly overdue at the time of their negotiation to the First National Bank in Indiana.

There is a further complication here. There is good authority which indicates that if one knows that negotiable [fol. 70] instruments have been accelerated, they become, at least as to him, overdue instruments.[7] There is testimony in this case from the cashier of the Indiana bank that he knew these bonds had been called. If the authorities just cited are correct, then the bank knowingly took overdue instruments. But in the Morgan case the Court states as a fact that the purchasers of the bonds knew that they had been called. And it is quite evident that the Court, through Mr. Justice Matthews, attached no significance to that fact. What would be held if the case came up today we have no way of knowing.[8]

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than to make the bonds mature 'on or before' the fixed final date of maturity . . ."); Lann v. United Steel Works Corp., 166 Misc. 465, 1 N. Y. S. 2d 951 (Sup. Ct., 1938) ("The notice of redemption . . . simply served to accelerate the date of payment").

[7] Britton, *supra*, § 121 (1942); Aigler, Cases on Bills and Notes, 587 (1947); Beutel's Brannan, *supra*, 697-698 (and cases collected therein). *But see* Chafee, Rights in Overdue Paper, 31 Harv. L. Rev. 1104 (1918).

[8] The modern commercial view upon the subject is expressed in Section 8-305 of the Uniform Commercial Code [Pa. Stat. Ann., tit. 12A, § 8-305 (1954)] which provides as follows:

"§ 8-305. Staleness as Notice of Claims of Ownership

"An act or event which creates a right to immediate performance of the principal obligation evidenced by the security or which requires that the security be presented or surrendered for redemption or exchange does not of itself

But there is one further point, however, which we think is controlling. In the Morgan case, the negotiation to the purchaser by the thief or one who held from him was within three months of the effective date of call. Does the time element make any difference? We think it does. Again reverting to language in the Smyth case and also language in the Morgan case, itself, we think this called bond became an instrument payable on demand at the option of the holder. Mr. Justice Matthews speaks of the instrument, after call, as "a bond redeemable at the treasury on demand without interest after maturity of the call . . ." Whether these bonds would be treated as "demand instruments" as to someone who did not know of the call, we need not decide. But we refer again to the admissions of the cashier of the [fol. 71] bank in Indiana. He knew that the bonds had been called. Certainly as to his bank these instruments became payable on demand at the option of the holder.

The rule for determining rights of purchasers of demand paper has been many times litigated.[9] A demand instrument circulates free from equities for a reasonable time. What is a reasonable time depends upon the nature of the paper, the usage of business with respect to such instruments and the facts of the particular case.[10] If the paper is currency it is hard to say when a reasonable time has passed. But a bond no longer bearing interest and with a batch of coupons calling for interest which have now become ineffective is

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constitute any notice of claims of ownership except in the case of a purchase

> "(a) after one year from any date set for a required presentment or surrender for redemption or exchange; or
>
> "(b) if funds are available for payment, after six months from any date set for payment of money against presentation or surrender of the security."

[9] Negotiable Instruments Law, § 53; Pa. Stat. Ann. tit. 56, § 135 (1930); Beutel's Brannan, *supra*, 716-721 (and cases collected therein).

[10] Negotiable Instruments Law, § 193; Pa. Stat. Ann. tit. 56, § 494 (1930).

hardly to be compared with a federal reserve note which one picks up as he cashes a check at a bank counter. In this case the bank in Indiana got these bonds about four and one-half years after the effective date of the call. We think that was not a reasonable time after they had become "due" and that, therefore, the taker could not claim the rights of a holder in due course.[11]

II. The Proof of Good Faith and Burden Thereof

It is true that the Indiana bank was not a purchaser of this paper in the sense that it bought it. But we do not think it helps the analysis of the problem to call the bank a mere "conduit." It was a "holder" of the paper because it was in possession of an instrument payable to bearer.[12] There is no doubt, too, that both Parnell and the bank were persons to whom the instrument had been negotiated. Section 30 of the Negotiable Instruments Law [Pa. Stat. Ann. tit. 56, § 81 (1930)] states:

> [fol. 72] "An instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof. If payable to bearer, it is negotiated by delivery; if payable to order, it is negotiated by the indorsement of the holder, completed by delivery."

Now we come to the provision of the law that contains the controlling language for this case. That is Section 59 of the Negotiable Instruments Law and here is the appropriate section as it appears in Purdon's:

> "§ 139. Burden of proof when title is defective.
>
> "Every holder is deemed prima facie, to be a holder, in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as holder in due course. But the last mentioned

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[11] Beutel's Brannan, *supra*, 716-718, 1344-1347.

[12] Negotiable Instruments Law, § 190; Pa. Stat. Ann. tit. 56, § 492 (1930).

> rule does not apply in favor of a party who became bound on the instrument prior to the acquisition of such defective title." Pa. Stat. Ann. tit. 56, § 139 (1930).

See First National Bank of Blairstown v. Goldberg, 340 Pa. 337, 17 A. 2d 377 (1941), where the section was applied.

In appellants' briefs there seem to be points made that the federal rule applies at this place and that if the federal rule applies the burden on the holder is different. We do not see any basis for this claim. We have already said that Pennsylvania law determines the rights acquired by transfer. But regardless of this the quoted section of the statute was a codification of the law merchant rule which had prevailed before the statute was passed. This is quite clear on the authorities. Conajoharie Nat. Bank v. Diefendorf, 123 N. Y. 191, 25 N. E. 402 (1890) (and cases cited therein); Keegan v. Rock, 128 Iowa 39, 102 N. W. 805 (1905) (and cases cited therein); Parsons v. Utica Cement Co., 82 Conn. [fol. 73] 333, 73 Atl. 785 (1909); Ireland v. Scharpenberg, 54 Wash. 558, 103 P. 801 (1909) (and cases cited therein); Campbell v. Cincinnati Fourth Nat. Bank, 137 Ky. 555, 126 S. W. 114 (1910). That being so, whether one goes to uncodified mercantile law or to codified statute the rule is just the same.

Now, to apply that rule to the situation in this case. Rocco was a holder. Parnell was a holder. Indiana bank was a holder. So must have been the person who took the bonds from plaintiff bank and passed them on. That person certainly had a defective title for he (or they) stole the bonds.[13] Therefore, under Section 59 of the statute, it was incumbent upon these defendants to show either that they or some person under whom they claimed held as a holder in due course. And the rights of a holder in due course are described in Section 57 of the statute[14] and the qualifications for one to become a person in that

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[13] Negotiable Instruments Law, § 55; Pa. Stat. Ann. tit. 56, § 135 (1930).

[14] Pa. Stat. Ann. tit. 56, § 137 (1930).

happy situation are stated in Section 52.[15] That provision, as it appears in Purdon's is also worth quoting.

"§132. Who is a holder in due course

"A holder in due course is a holder who has taken the instrument under the following conditions:

1. That it is complete and regular upon its face.
2. That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact.
3. That he took it in good faith and for value.
4. That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it."

[fol. 74] We are, therefore, in this situation. The instruments are shown to be stolen. Someone has them. We do not know who, nor do we know how they got to Rocco. We do know that Rocco turned them over to Parnell, Parnell to the bank in Indiana and that bank in turn to Federal Reserve in Cleveland. By the words of the statute the burden is on these people, to establish their lack of notice of defective title.

The only thing that an appellate court needs to decide upon this question is whether the verdict of the jury, which necessarily found they did not establish their lack of notice, is a supportable verdict. Both the bank and Parnell claimed that they took the paper in ordinary course of business and the bank pointed out that all it got out of the transaction was a small fee for collection. Mr. Parnell likewise claimed to have made only a nominal amount for handling the collection for Rocco but his testimony was flatly contradicted by Rocco who was brought back from jail to testify and was not cross-examined by either of the other defendants.

As to Parnell, the testimony of Rocco, if the jury believed it, (and after verdict we must take it that they did), was itself sufficient to cast very great suspicion

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[15] Pa. Stat. Ann. tit. 56, § 132 (1930).

upon the honesty of Parnell's claim of good faith. The language in which Rocco described the matter, too, was, again if his testimony was believed, enough to discredit good faith in the transaction. For example, when questioned about procedure, he said, "Well, I can't answer that question truthfully either, as to whether he took his out or I gave him his . . . " The whole affair seemed to have been conducted without any record of any kind being made by either party.

There was this business, too, of the way in which the money was secured. The cashier of the bank, it was testified, telephoned to Mr. Parnell when the credit was received from Federal Reserve Bank, and Parnell got a cashier's check for the amount right away and immediately proceeded to cash it and get the money in small bills. [fol. 75] This was done with the two batches of bonds here concerned and with another batch of bonds which had been cashed a little bit earlier. Now, of course, there is nothing against the law in a man getting a check cashed in any form he wants it. But it does seem a little unusual to have even a lawyer who does business for clients in three transactions get several thousands of dollars worth of small bills. At least twelve reasonable jurors might raise their eyebrows at this. The facts do not tend to show the regularity and good faith of the transaction, the "ordinary course of business" aspect of the things the parties were doing. Furthermore, the jury saw the witnesses.

As to Mr. Parnell, the point discussed earlier in this opinion with regard to a called bond becoming demand paper does not apply. There is nothing to show that Mr. Parnell knew the bonds had been called and he, himself, denied it. The verdict for the plaintiff, as to him, rests on the fact that the jury's finding that the burden of proving good faith had not been sustained is a verdict which is sufficiently supported by the evidence.

Now as to the bank, if we are right in saying that the bank was a taker of demand paper an unreasonable length of time after the maturity had been advanced by the call, the bank is clearly liable. Even without that, however, there is enough here to let the verdict stand although the

evidence is not so strong against the bank as it is against Mr. Parnell.

We think the circumstances surrounding this negotiation were such as to arouse some suspicion. These two batches of bonds and one other before had been collected by the bank on behalf of Mr. Parnell. Notification was given him by telephone by the same bank officer each time. He received a cashier's check each time and proceeded to cash it into currency each time. With regard to the bonds here involved the bank took them, knowing they were called, with unpaid coupons, eight in number, [fol. 76] attached to them. And these coupons, as already has been explained, do not call for the payment of money since the call cancelled the obligation to pay interest.

When one goes back to the earlier cases which talk about overdue paper, one of the things which is stressed is the fact that this overdue paper is not the kind of thing which is circulating in the channels of commerce; that the fact it is still around after its maturity shows something, not criminal, but not in due course of business either. We think that the taking of such paper as that involved here is not the ordinary course of business kind of thing which one would expect to be done. Or, if that is too strong, the fact that it was so taken does not help the party with a burden of establishing his good faith to show it.

We conclude that as to both the defendant, Parnell, and the bank, there is sufficient evidence to justify the jury's finding against them in view of the burden which they had under the law.

III. Objections to Exhibits.

There were certain exhibits to which objection was made. These consisted of a notice sent out by the Federal Reserve Bank of San Francisco to the Pittsburgh Branch, Federal Reserve Bank of Cleveland, notices of claim of loss from the plaintiff bank addressed to the Pittsburgh Branch of the Federal Reserve Bank of Cleveland, a copy of a notice circulated by the Federal Bureau of Investigation in the area of the Pittsburgh Branch of the Federal Reserve Bank of Cleveland. It is not

laimed that any of these reached the Indiana bank so as to charge it with the knowledge which these notices contained. The judge limited their use to the establishment of the loss by the plaintiff and that notices of the loss went out through banking channels.[16] This was not [fol. 77] error. The analogy of the "hue and cry" immediately suggests itself. And we think that the fact of a notice being broadcast in the bank's vicinity is admissible on the question of whether the bank may have had some knowledge. But, in view of the limitation placed by the judge upon the evidence we need not decide this.

IV. Joint and Several Tortfeasors.

The defendant bank also asked for an instruction to the effect that the plaintiff could not have a verdict against more than one of these alleged converters. This instruction was refused and it claims error. We think the bank is incorrect. The general rule with regard to the liability of several persons in such an action as this is that the satisfaction of the judgment against one precludes proceeding against another. This is the rule as it appears in the Restatement of Torts, § 249, and this is the rule as it is generally applied in Pennsylvania. Union of Russian Societies of St. Michael & St. George, Inc. v. Koss,

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[16] In reference to these exhibits the Court said: "I have admitted those prior exhibits, in accordance, as I understand, with plaintiff's theory, that the bonds disappeared from the bank, not in the ordinary course of business, but in effect that they were stolen, that they gave notice, that they acted as a person who had lost some property. And through banking channels, the proper notices were given.

"Now, the question is, it isn't necessarily conclusive on your man, your bank, as to whether they got it or whether they didn't. But notices went out through banking channels. If he wants to bring that home to you, that is up to him."

The limitations on the use of these exhibits were explained to the jury on at least two occasions during the course of the trial.

348 Pa. 574, 36 A.2d 433 (1944). There is some early authority in Pennsylvania that seems to indicate in actions for conversion that the securing of a judgment against one alleged tortfeasor has the same effect. See, *e.g.*, Hyde v. Kiehl, 183 Pa. 414, 38 Atl. 998 (1898). These cases are not new and the authorities above cited announce the present-day rule. Whether the older cases represent the present law of Pennsylvania is doubtful. See Goodrich-Amram, Procedural Rules Service, §§ 2229(b), 2232(f), 2232(f)-1 (1940). But even then they do not go so far as to preclude a verdict against more than one defendant. It might well be, if they were still effective, that a plaintiff [fol. 78] would have to elect, before judgment was entered, which defendant he wanted to pursue. There is, we conclude, no merit in this point made by the defendant.

The appellants have raised other points but there is no merit in them and they do not require discussion. We agree with the majority on the matter of interest.

Our view of the case would require affirmance in 11,526, 11,533 and 11,536.

Kalodner, Circuit Judge authorizes me to state that he concurs with the views expressed in the foregoing dissent.

McLaughlin, *Circuit Judge,* dissenting.

I agree with the views expressed by Judge Goodrich in his dissent.

[fols. 79-80] UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 11,526

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION

vs.

ARTHUR A. ROCCO, GILBERT S. PARNELL, FIRST NATIONAL BANK IN INDIANA, and Federal Reserve Bank of Cleveland, First National Bank in Indiana, Appellant

On Appeal from the United States District Court for the Western District of Pennsylvania

Present: Biggs, Chief Judge, and Maris, Goodrich, McLaughlin, Kalodner, Staley and Hastie, Circuit Judges.

JUDGMENT—October 14, 1955

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby reversed, with costs, and the cause remanded with instructions that judgment be entered for the First National Bank in Indiana.

By the Court, Staley, Circuit Judge.

October 14, 1955.

[fols. 81-85] UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 11,536

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION

vs.

ARTHUR A. ROCCO, GILBERT S. PARNELL, FIRST NATIONAL BANK IN INDIANA, and Federal Reserve Bank of Cleveland, Gilbert S. Parnell, Appellant

On Appeal from the United States District Court for the Western District of Pennsylvania

Present: Biggs, Chief Judge, and Maris, Goodrich, McLaughlin, Kalodner, Staley and Hastie, Circuit Judges.

JUDGMENT—October 14, 1955

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby reversed, with costs, and the cause remanded with instructions that a new trial be granted to Gilbert S. Parnell.

By the Court, Staley, Circuit Judge.

October 14, 1955.

[fol. 86] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 87] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1955

No. 579

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, Petitioner,

vs.

GILBERT S. PARNELL

ORDER ALLOWING CERTIORARI—Filed February 27, 1956

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 88] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1955

No. 580

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, Petitioner,

vs.

FIRST NATIONAL BANK IN INDIANA

ORDER ALLOWING CERTIORARI—Filed February 27, 1956

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Office - Supreme Court
DEC 2) 19
HAROLD B. WILLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

NO. ~~579~~ 21

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, Petitioner

v.

GILBERT S. PARNELL, Respondent

NO. ~~580~~ 22

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, Petitioner

v.

FIRST NATIONAL BANK IN INDIANA, Respondent

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

NO. .....

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, Petitioner

v.

GILBERT S. PARNELL, Respondent

NO. .....

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, Petitioner

v.

FIRST NATIONAL BANK IN INDIANA, Respondent

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Bank of America National Trust and Savings Association prays that writs of certiorari issue to review the judgments of the United States Court of Appeals for the Third Circuit, entered October 14, 1955, reversing judgments in favor of petitioner against the respondent Gilbert S. Parnell and the respondent First National Bank in Indiana, and remanding the case to the district court with instructions to enter judgment for the respondent Bank and to grant a new trial to respondent Parnell.

OPINIONS BELOW

The opinion of the District Court (Applt's. App. 445a-447a) is unreported and is printed in Appendix B hereto, infra, p. 29. The opinion of the Court of Appeals is reported in 226 F. 2d 297. Nine additional copies of its opinion have been filed with the Clerk contemporaneously with the filing of this petition.

JURISDICTION

The judgments of the Court of Appeals were entered on October 14, 1955, and are printed in Appendix C hereto, infra, p. 32. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the rule announced in *Clearfield Trust Co. v. United States,* 318 U. S. 363, with respect to the rights of the United States on one of its checks, is to be extended to a case arising under diversity jurisdiction and involving only the rights of private parties with respect to the ownership of bonds of an instrumentality of the United States?

In other words, in a diversity case, is the question whether a private defendant converted bonds of an instrumentality of the United States, in Pennsylvania, to be governed by the law of Pennsylvania or by a "federal" law?

2. Assuming that the question of conversion of bonds of an instrumentality of the United States, as

between private parties, is to be governed by "federal" law, is the source of that federal law (with respect to such issues as burden of going forward with evidence of good faith and dealing with the bonds after maturity) to be found in old federal decisions or in the provisions of the Negotiable Instruments Law which has been enacted in every state of the Union and by Congress for the District of Columbia?

3. Where theft or defective title has been shown, does not the one who asserts the defense of bona fide purchaser have the burden of proving the defense, under both federal decisional law and the Negotiable Instruments Law of Pennsylvania?

4. May one who takes bonds of an instrumentality of the United States four and one-half years after they have been called and with notice of the call claim the rights of a holder in due course?

STATUTES INVOLVED.

The statutory provisions involved are the Rules of Decision Act, 28 U.S.C. §1652; and Section 59 of the Pennsylvania Negotiable Instruments Law, Act of May 16, 1901, P.L. 194, Pa. Stat. Ann. Tit. 56, §139 (1930). They are printed in Appendix A, infra, p. 28.

STATEMENT

This was a civil action brought by petitioner in the District Court to recover for the conversion of $57,600 principal amount of 3% Series A bearer bonds of Home Owners' Loan Corporation. The jurisdiction of the District Court was invoked on the basis of the diverse citizenship of the parties under 28 U.S.C. §1332.

The bonds here involved were part of a larger group of Home Owners' Loan bonds which had been purchased by petitioner and which were stolen by sneak thieves in May, 1944 (Applt.'s App. 32a-92a) while they were being prepared by petitioner's clerk for transmission for payment. Notice of the loss or theft of the bonds, including the serial numbers of the bonds, was disseminated promptly throughout the United States (Applt.'s App. 93a-114a).

In September of 1948 the defendant Rocco turned over to the defendant-respondent Parnell, who was a lawyer, $25,000 of stolen West Penn Power Company and United States Treasury bonds (Appellee's App. 13b-21b). Parnell took them to the defendant-respondent First National Bank in Indiana, and the bank, acting through its cashier, disposed of them and gave Parnell a check, which he immediately endorsed and surrendered for currency (Appellee's App. 13b-15b, 25b-26b; Applt.'s App. 313a-314a, 348a-349a).

Eighteen days after this transaction, Parnell brought into the defendant bank $19,600 of the Home Owners' Loan bonds here in suit, and twenty-seven days later brought in the remaining $38,000 of bonds, all of which he had received from Rocco (Applt.'s App. 13a-14a, 303a-306a). These bonds had been called for pay-

ment in 1944 (Applt.'s App. 64a) and eight overdue coupons, representing four years' interest, were attached to each bond (Applt.'s App. 175a). In each instance Parnell dealt with the cashier, the same man as before, who knew that the Home Owners' Loan bonds had been called for redemption as of a date almost four and a half years earlier (Appellee's App. 14b-15b; Applt.'s App. 313a-314a, 343a).

The defendant bank sent the first group of Home Owners' Loan bonds to the Federal Reserve Bank branch in Pittsburgh for redemption (Applt.'s App. 153a, 171a, 334a-337a). The cashier telephoned Parnell when a credit advice was received from Pittsburgh, and Parnell thereupon went to the bank and received a cashier's check, which he immediately cashed at the bank, taking the proceeds in currency in bills of $100 and smaller (Applt.'s App. 316a-319a, 344a). Parnell took the currency to his office, telephoned Rocco that it was there, and paid him in currency. No receipts were given for the bonds; in fact, there were no receipts, correspondence, checks or writings given or received by Parnell except cashier's checks, which he cashed immediately on receipt (Applt.'s App. 311a-313a).

The $38,000 of bonds involved in the last transaction were handled in the same way, Parnell dealing with the same cashier and turning the cashier's check into small denomination bills immediately upon its receipt (Applt.'s App. 318a, 345a).

The defendants' attempt to prove their good faith was based almost entirely, if not exclusively, on the testimony of Parnell and of the bank's cashier. The jury by its verdicts showed that this testimony was not believed. The District Judge said (Appendix B, infra, p.

30): "The question as to whether defendants Parnell and the Bank in Indiana acted innocently and in good faith was for the jury. The jury has spoken and it is believed that the verdict is just and proper under the evidence presented." And Judge Goodrich added in his dissent from the opinion of the Court of Appeals (226 F. 2d 307): "The facts do not tend to show the regularity and good faith of the transaction, the 'ordinary course of business' aspect of the things the parties were doing. Furthermore, the jury saw the witnesses."

The jury returned verdicts against each of three defendants and in favor of petitioner in the amount of $57,600 (Applt.'s App. 439a), and judgments were entered thereon (Applt.'s App. 448a). The defendants Gilbert S. Parnell and First National Bank in Indiana appealed. No appeal was taken by Arthur A. Rocco, the third defendant against whom judgment was entered.

The Court of Appeals for the Third Circuit, after argument on the appeals, ordered a rehearing before the entire bench of seven judges. After this rehearing the judgments appealed from were reversed and the cause remanded upon the opinion of a majority of four members of the court holding that the questions were to be decided under federal law and that under federal law the respondents were not required to establish their defense of good faith purchasers. The court directed that judgment should be entered for the defendant First National Bank in Indiana for want of sufficient evidence of bad faith and a new trial granted the defendant Parnell because of improper instructions as to burden of proof of good faith. Three members of the court dissented in an opinion by Circuit Judge Goodrich.

REASONS FOR GRANTING THE WRITS

1. ***The decision of the Court of Appeals, that the question involved here, between private parties, is to be decided under federal decisional law, presents an important question in the operation of the Federal System established by the Constitution, and under the Rules of Decision Act***[1]. The decision presents a question of far-reaching importance in the administration of the work of the Federal courts, and of the extent to which this Court's decision in *Clearfield Trust Co. v. United States,* 318 U.S. 363 should be applied or extended.

The decision of the majority of the Court of Appeals is that the property rights of owners and transferees of Government bonds, as among themselves, are not to be determined by the statutory law of the state where all the operative events occurred, but by the decisional law of negotiable instruments developed independently by the Federal courts under the regime of *Swift v. Tyson,* 16 Pet. 1. The sole basis of decision is the court's own determination that uniformity of results is desirable in private litigation involving Government bonds. In reaching this conclusion the court gave no effect to the facts that no Congressional enactment or federal regulation was involved, that the United States was not a party, and that the nature of its rights and obligations was not in dispute. This decision, it is submitted, seriously misinterprets the basis of *Clearfield* and is in conflict with the doctrine established by the decisions of this Court in *Burns Mortgage Co. v. Fried,* 292 U.S. 487, *Erie R. Co. v. Tompkins,* 304 U.S. 64,

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[1] 28 U.S.C. § 1652.

Guaranty Trust Co. v. York, 326 U.S. 99, and *Ragan v. Merchants Transfer & Warehouse Co.,* 337 U.S. 530.

(a) *The essential basis of Clearfield.* It is submitted that the essential basis of *Clearfield* is the fact that the right or cause of action there asserted was not a state-created right. The Government had issued a check which had been endorsed and collected by the defendant on a forged endorsement. The law which authorized the issuance and payment of the check was the statutory law of the United States. *Its* right to recover was dependent on the legal consequences to be attributed to the transaction in which *it* had engaged. Since the right to do the acts was dependent solely on federal law, this Court held that the consequences of the acts were to be determined by the same law. The application of state law would permit the states to limit and condition the legal rights of the United States, and make its rights dependent on the will of the states, a situation objectionable under our dual system of government.

In the present case the question arises between private parties with respect to the ownership of property dealt with in Pennsylvania. The substantive right asserted is created solely by the law of Pennsylvania. To apply Federal decisional law to the determination of such a right, unless the Constitution or a federal statute so directs, serves no interest of the United States, and introduces an undesirable and fruitless diversity into the law governing private transactions in negotiable paper. It is one thing to say that the rights and obligations of the United States are to be determined under its own law; it is a wholly different thing

to say that the rights and liabilities of private parties are also to be decided by federal law although the United States has not, by statute or regulation, entered or in any sense occupied or preempted the field. Such a decision extending the rule of *Clearfield Trust Co. v. United States* introduces uncertainty into the law throughout the United States until it is either confirmed or disapproved by this Court.

In *Guaranty Trust Co. v. York*, 326 U.S. 99, Mr. Justice Frankfurter, speaking for the majority of the Court, carefully pointed out at page 109: "Here we are dealing with a right to recover derived not from the United States but from one of the States." Again, at page 112: "The source of substantive rights enforced by a Federal court under diversity jurisdiction, it cannot be said too often, is the law of the States."

The same doctrine is reaffirmed in the opinion of Mr. Justice Douglas (announced by Mr. Justice Reed) in *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530, at 533:

> "* * * But in the present case we look to local law to find the cause of action on which suit is brought. Since that cause of action is created by local law, the measure of it is to be found only in local law."

(b) *The decision below is in conflict with United States v. Guaranty Trust Co.*, 293 U.S. 340. That case involved a check of the United States drawn in the District of Columbia and sent by mail to Yugoslavia. It was there transferred by forged endorsement and in due course reached the Guaranty Trust Company, under fur-

ther endorsements. The Guaranty Trust Company presented it to the United States, and received payment. When the forgery was discovered, the United States sued the Guaranty Trust Company. The decision went against the United States, and it went that way on the ground of ownership of the instrument. The Court looked to the law of Yugoslavia, where the instrument was transferred under the forged endorsement. It found that under the law of Yugoslavia the transferee under a forged endorsement acquired a good title. Consequently, it held that when the Guaranty Trust Company received the check in the United States, it, too, acquired a good title, and, as owner, was entitled to keep the payment which it had received when it gave up the instrument.

The important thing to note here is that the *Guaranty Trust* case was not decided under any supposed "federal" rule. The Court held that the result in the case turned on the ownership of the instrument, as between private parties. It decided that question of ownership in accordance with the local law of the place where the transfer had occurred. That local law was different from any law in effect in the United States. Nevertheless, it was held applicable and controlling in determining the ownership of this instrument, which was a Government check.

It is true that in the *Guaranty Trust* case the check was addressed to Yugoslavia, and the Court said that "It was thereby given something of the quality of a foreign bill; * * *." 293 U.S. at 346. What this apparently means is that the United States sent the check into Yugoslavia and must therefore be deemed to have con-

sented to the application of Yugoslavian law, or at least must have understood that Yugoslavian law might be applied to questions of transfer of the check. However, in the present case, the bonds were issued in the United States, and the United States intended that they should circulate throughout the United States, in each one of which the Negotiable Instruments Law is in force. In the absence of a specially prescribed "federal" rule, it seems appropriate to say that the United States understood that these bonds would circulate in the United States in accordance with the provisions of the Negotiable Instruments Law, so far as ownership by private parties is concerned, just as it was held that the ownership of the check involved in the *Guaranty Trust* case was subject to the law of Yugoslavia when it was sent there.

The decision below is, in principle and in substance, in conflict with the basis of the decision in the *Guaranty Trust* case in determining the law applicable to the effect, as between private parties, of the transfer of a Government instrument.

Reference may also be made to the long established rule that, though a question of the validity or infringement of a patent is within federal jurisdiction, a question involving the transfer or assignment of patent rights does not present a federal matter. *Luckett v. Delpark, Inc.,* 270 U.S. 496; *Wade v. Lawder,* 165 U.S. 624; *Wilson v. Sandford,* 10 How. 99.

(c) *The constitutional and statutory obstacles to the proposed extension.* The extension of *Clearfield,* resulting from the decision below, inevitably raises the very important constitutional considerations which arise from the fact that ours is a Federal government

where the maintenance of the proper spheres of the States and of the Federal Government is fundamental. These considerations, stemming from the framework of our Constitution, are well known, and are spelled out in detail in the opinion of Mr. Justice Brandeis in the *Erie* case. We need not discuss here, however, whether the result in *Erie* turns upon a "constitutional basis" or a more limited "statutory basis." The statutory basis of *Erie* is here presented in sharp focus. The Rules of Decision Act has represented the will of Congress since 1789. This Act provides:

> "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

There has been discussion as to whether or not this statute applies in non-diversity cases such as *Clearfield*.[1] It has never been doubted, however, that the statute is fully applicable where the jurisdiction of the federal court is based on diversity of citizenship. The Court of Appeals does not refer to or discuss this basic and fundamental statute. The ignoring of this command of Congress raises a question of importance in the administration of the Federal System. No basis is known for saying that this is one of the cases to which "the laws of the several states" do not apply so as to bring into effect the reservation at the close of the statute.

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[1] See *Clearfield: Clouded Field of Federal Common Law*, 53 Columbia L. Rev. 991 (1953).

The mandate of the statute is even more demanding in this case than in *Erie*. The problem here is not between the law as established by coordinate courts as it was in *Erie*, but between federal decisional law and state statutory law. In *Burns Mortgage Co. v. Fried, supra*, this Court unanimously determined that in a case involving only the rights of private parties the statutory law of a state (there, as here, the Negotiable Instruments Law) and the construction thereof by a state court of last resort could not be rejected in favor of federal decisional law, and that this was true whether the enactment was one which altered the common law or one which merely codified and declared it. In view of the decision in *Burns Mortgage Co.* it would seem more proper to refer to the decision here as an extension of *Swift v. Tyson*, 16 Pet. 1, than as an extension of *Clearfield*. Certainly, in underlying philosophy and reasoning, the decision here is more a brother of *Swift v. Tyson* than of *Clearfield*. If the decision below is sound, then surely "the ghost of Swift v. Tyson, supra, still walks abroad." *Sampson v. Channell*, 110 F. 2d 754, 761 (C.C.A. 1st, 1940).

(d) *The remote interest of the United States.* The decision of the Court of Appeals is predicated upon three assumptions, viz.: (i) that the United States has an interest (undefined) in the outcome of litigation between holders of Government bonds; (ii) that in order to protect this interest, there must be uniformity in the determination of the rights of owners as against transferees of such bonds; and (iii) that such uniformity will be attained if these rights are determined by federal decisional law rather than state statutory law. It is

submitted that all three assumptions are unsound, and that the decision introduces uncertainty and confusion which may actually work against the interest of the United States.

If the United States has in fact any substantial interest in the outcome of litigation between private parties who deal in its bonds, the proper and effective way to achieve uniformity of result would be to state the rule deemed proper in a statute or appropriate regulation. This has not been done. The only statute[1] here involved authorizes the issuance of the bonds and is completely silent as to the rights of owners and transferees, except that it is provided that the bonds are to be free of certain taxes. The United States Treasury Department Regulations[2] are equally silent so far as the rights of owners and transferees are concerned. These regulations set forth in considerable detail the procedures followed by the Treasury Department in making payments on the public debt and are very careful to point out that the Treasury Department cannot undertake to protect owners of lost or stolen coupon bonds or notes. They do not purport to touch upon the rights of owners and transferees as among themselves.

The Court of Appeals has not seen fit to spell out how the United States would benefit by having applicable to United States bonds a rule as to the rights of transferees which is contrary to the rule applicable in every state of the Union and in the District of Co-

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[1] Home Owners' Loan Act of 1933, 48 Stat. 128 (1933), 12 U.S.C. §§ 1461 et seq.

[2] Title 31, Code of Federal Regulations, Chapter II, Part 306.

lumbia with respect to the rights of transferees of other bonds. The absence of any provision in the statute authorizing the issuance of the bonds and in Treasury Department regulations suggests rather strongly that the rights of owners and transferees as among themselves are of no vital concern to the United States. This is not surprising. We find it difficult to believe that the salability of Government securities will be substantially affected one way or another by the determination of disputes among owners and transferees. Assuming, however, that the United States does have some interest in such disputes, we submit that investors are more likely to be deterred from investing in, than encouraged to invest in, Government bonds by rules of law which make it easier for a thief to dispose of a Government bond than bonds of private corporations.

The assumption that a better uniformity of result will be achieved by applying federal decisional law rather than a uniform law adopted in all forty-eight states and the District of Columbia seems equally unsound. Uniformity of law by the decisional process is slow and costly. It is also illusory, unless this Court can be expected to have opportunities for, and to devote its time to, the development of a law of negotiable instruments separate and apart from that contained in the Negotiable Instruments Law. Uniformity by the application of federal decisional law is predicated on the hypothesis that the right of review by this Court provides a full and complete mechanism for reconciling conflicting opinions. The pressure of business on this Court understandably makes review here the exception rather than the rule and, as Judge Augustus Hand has pointed out in *Cole v. Pennsylvania R. Co.*, 43 F. 2d 953, 957

(C.C.A. 2d, 1930): "Consequently there is much less chance than formerly of securing or even promoting uniformity through the decisions of the Supreme Court."

An interesting analogy to the case at bar was presented at the last term of this Court in *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U. S. 310. The action was on a policy of marine insurance on a houseboat used for commercial carriage of passengers on an artificial lake between Texas and Oklahoma. The insurer defended on the ground of breaches of warranty against use of the boat for commercial purposes without its consent. It was claimed that the policy had been delivered in Texas, under whose statutes a breach of warranty could not constitute a defense unless the breach had contributed to bring about the destruction of the property. The District Court made no finding as to whether the policy had been delivered in Texas but held that, since it was a maritime contract, federal admiralty law, and not state law, governed. The Court of Appeals affirmed a judgment for the defendant. This Court reversed the judgment and remanded the cause to the District Court for trial under appropriate state law. Mr. Justice Black, delivering the opinion of the Court, said at page 319:

> "The hearings on the McCarran Act reveal the complexities and difficulties of an attempt to unify insurance law on a nationwide basis, even by Congress. Courts would find such a task far more difficult. Congress in passing laws is not limited to the narrow factual situation of a particular controversy as courts are in deciding lawsuits. And Congress

> could replace the presently functioning state regulations of marine insurance by one comprehensive Act. Courts, however, could only do it piecemeal, on a case-by-case basis. Such a creeping approach would result in leaving marine insurance largely unregulated for years to come."

How long, "on a case-by-case basis," would it take the federal courts to fashion a law of negotiable instruments distinct from the states' statutory law?

In considering the soundness of the decision here, one may properly contrast the "attractive vision of a uniform body of federal law"[1] with these very practical considerations: The whole development of the law of negotiable instruments in this country has been dominated in the past fifty years by the provisions of the Negotiable Instruments Law. The Act has been interpreted and applied in literally thousands of decisions by both state and federal courts. There have been some conflicting interpretations, but these are relatively minor as measured by the degree of uniformity which has been achieved. Federal decisional law independent of the statute has been relatively meager, if not altogether lacking, for the past fifty years. It is interesting to note, for example, that the cases principally relied upon by the majority (*Murray v. Lardner,* 2 Wall. 110, and *Morgan v. United States,* 113 U.S. 476) were decided in 1864 and 1885, respectively. The number and variety of transactions taking place daily in Government securities are very large. Whether these transactions consist of pledges, assignments, gifts or other dispositions,

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[1] *Guaranty Trust Co. v. York,* at page 103.

the rights of the parties in all these transactions are now to be determined by an archaic and a largely non-existent federal decisional law and without the benefit of the provisions of the N.I.L., or the judicial experience under it. The primary source of reference for judges and lawyers called upon to advise or determine with respect to the effect of such transactions has been the Negotiable Instruments Law. The fact that the statute and the decisions under it may no longer be relied upon will come as a surprise, we think, to most lawyers and courts and do more to create uncertainty than to remove it.

2. *If the question here involved is to be decided under federal law, the question of the sources from which that law is to be drawn is one of great importance and has been wrongly decided by the court below.*

The decision is, in its approach and reasoning, contrary to this Court's decision in *Funk v. United States,* 290 U. S. 371. That case involved the question whether the wife of the defendant in a criminal case in a federal court was a competent witness in his behalf. Under the rules then applicable, that question was a matter of "common law." This Court had at least twice, and fairly recently, decided that a wife was not a competent witness. *Hendrix v. United States,* 219 U. S. 79, and *Jin Fuey Moy v. United States,* 254 U. S. 189. On the basis of these decisions, the trial court had excluded the defendant's wife as a witness, and this was affirmed by the Court of Appeals for the Fourth Circuit. When the case came here, however, the decision was reversed. The Court pointed out that legislation generally had removed

the disqualification of the wife to testify in the states. In reaching this result, the Court referred to *Benson v. United States,* 146 U. S. 325, and *Rosen v. United States,* 245 U. S. 467, in both of which cases it was held that a codefendant was a competent witness. In the *Funk* case, the Court said that the conclusion in the *Rosen* and *Benson* cases "was based not upon any definite act of legislation, but upon the trend of congressional opinion and of legislation (that is to say of legislation generally), and upon the great weight of judicial authority which, since the earlier decisions, had developed in support of a more modern rule. In both cases the court necessarily proceeded upon the theory that the resultant modification which these important considerations had wrought in the rules of the old common law was within the power of the courts to declare and make operative." 290 U. S. at 380. The Court then went on to say that where Congress did not exercise its power, it was the duty of the Court "to decide" the question "in accordance with present day standards of wisdom and justice rather than in accordance with some outworn and antiquated rule of the past." 290 U. S. at 382. The Court then held that because of the widespread statutory change the old rule was now out of date, and a more modern rule should be recognized, namely that a wife is a competent witness. The *Hendrix* and the *Jin Fuey Moy* cases were both expressly overruled.

The applicability of the *Funk* case to the problem involved here is clear. On the question of burden of proof the Court of Appeals relied on a decision of this Court in 1864. Since that time, the Negotiable Instruments Law has been written, and has been adopted by

every state in the Union, and by Congress for the District of Columbia. Thus, the old rule exemplified by *Murray v. Lardner,* 2 Wall. 110, if correctly interpreted by the court below, is now completely outdated and should no longer be regarded as stating the rule applicable in the federal courts.[1] The parallel between the two situations seems very close. As a matter of fact, the present situation is much stronger than that involved in the *Funk* case, since the cases overruled in the *Funk* case were much more recent, and since the statutory provisions relied on as changing the common law in the *Funk* case were varied, while here the common law of the country, as between private parties, has been restated by the adoption of the Negotiable Instruments Law by every state, and by Congress for the District of Columbia.

There are other cases which support the conclusion that even though the matter is governed by "federal" law, the source of this law should be found in the Negotiable Instruments Law. Reference may be made to *Burns Mortgage Co. v. Fried,* 292 U. S. 487. That case was a diversity case. It was decided in 1934, while *Swift v. Tyson* was still operative, before the decision in *Erie Railroad Co. v. Tompkins.* The case involved a negotiable instrument. Thus, it raised a question of commercial law, and under *Swift v. Tyson* this question was to be decided in accordance with the "federal common law." The Court, speaking through Mr. Justice Roberts, held that the question should be decided under

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[1] As we contend under point 3, *infra,* page 23, the correct interpretation of the *Lardner* case is that it does not conflict with §59 of the N.I.L.

the Negotiable Instruments Law as interpreted and applied by the Florida court. Thus, for this purpose, the decision of the Court amounted to a decision that the "federal common law" in this field was determined by the state law of Florida embodied in the Florida statute and the decision of the Florida Supreme Court.

Other cases presenting a similar approach include *Mutual Life Insurance Co. v. Johnson,* 293 U. S. 335, 340; *Marine National Exchange Bank v. Kalt-Zimmers Manufacturing Co.,* 293 U. S. 357, 366-367; and *Board of County Commissioners v. United States,* 308 U. S. 343, 351-352.

With respect to the source of federal law on such a matter as that here involved, the decision below appears to be in conflict with *New York, N. H. & H. R. Co. v. Reconstruction Finance Corporation,* 180 F.2d 241 (C.C.A. 2d, 1950). That case arose in connection with the reorganization of the New Haven Railroad under Section 77 of the Bankruptcy Act. The question was whether a renunciation of interest was valid. The Reconstruction Finance Corporation contended that the question must be decided in accordance with "federal common law," and not under Section 122 of the Negotiable Instruments Law as enacted in New York. With respect to this contention, the court, speaking through Judge Learned Hand, said (180 F.2d at 244):

> "The purpose of the doctrine that the transactions of such corporations are not subject to state law, is that such agencies, being national in their scope and aim, shall not be forced to shape their transactions to conform to the vary-

ing laws of the places where they occur, or are to be carried out. Uniformity is thought to be essential to the convenient and speedy dispatch of their operations. However, the Negotiable Instruments Law has been enacted in every state of the Union, as well as in the District of Columbia; it is a source of 'federal law'—however that phrase may be construed—more complete and more certain, than any other which can conceivably be drawn from those sources of 'general law' to which we were accustomed to resort in the days of Swift v. Tyson. So far as it applies to the letter of December 21, 1938, it will therefore determine the rights of the respondent and the liabilities of the present petitioner, for it is New York law as well as 'federal law.' "

See also, to similar effect, *Whitin Machine Works v. United States*, 175 F.2d 504, 507 (C.C.A. 1st, 1949).

One of the serious consequences of the decision in this case is that the dead hand of decisional law developed almost a century ago is perpetuated and placed beyond the power of the states to alter or change, either by judicial decision or statutory enactment. If Pennsylvania is to be no longer free to legislate with respect to such matters as the morals of the market place, federal rules established at such an early date should not be accepted without critical appraisal of the soundness of the rules in relation to present day conditions. The words of Mr. Justice Black in the dissenting opinion in *Francis v. Southern Pacific Co.*, 333

U.S. 445, at pages 452-453, are peculiarly appropriate here:

> "* * * The old Adams rule, questionable enough in its 1904 environment, should in my judgment be critically examined and then abandoned as wholly incongruous with the accepted pattern of our modern society as embodied in legislative enactments. * * *
>
> I.
>
> It should be noted at the outset that tort law has been fashioned largely by judges, too largely according to the ideas of many. But if judges make rules of law, it would seem that they should keep their minds open in order to exercise a continuing and helpful supervision over the manner in which their laws serve the public. Experience might prove that a rule created by judges should never have been created at all, or that their rule, though originally sound, had become wholly unsuited to new physical and social conditions developed by a dynamic society. A revaluation of social and economic interests affected by the old rule might reveal the unwisdom of its expansion or imperatively require its revision or abandonment."

3. *The decision of the Court of Appeals that the defendant-respondents were not required to prove their asserted defense of being purchasers in due course is directly in conflict with the decision of the Court of Appeals for the Sixth Circuit in Kean v. National City Bank, 294 Fed. 214 (1923), cert. den. 263 U.S. 729, the*

decision of the Court of Appeals for the Seventh Circuit in C. F. Childs & Co. v. Harris Trust & Savings Bank, 27 F. 2d 633 (1928), cert. den. 278 U.S. 653, and the decision of the Court of Appeals for the Tenth Circuit in Queenan v. Mays, 90 F. 2d 525 (1937), cert. den. 302 U.S. 724. Each of these cases involved the alleged conversion of United States bonds, and in each it was held that the burden of proving the defense of bona fide purchaser rested upon the party asserting the defense.

In the *Kean* case the court, speaking without reference to state law, said (294 Fed. at 226):

> "As an aid in retrial, it remains only to say that in our opinion the defense of bona fide purchaser is an affirmative defense, and the burden of proving it rests with the defendant. Curtis, Collins & Holbrook Co. v. United States, supra; Wright-Blodgett Co. v. United States, 236 U.S. 397."

The *Childs* case and the *Queenan* case refer to state statutory law, and presumably were applying such law rather than any independent federal decisional law. This does not lessen the conflict with the decision here, however, since United States bonds were involved and the result here would have precluded the use of state statutory law.

Murray v. Lardner, 2 Wall. 110, upon which the majority relies, does not in fact hold anything contrary to the rule announced in the *Kean* case or the *Childs* and *Queenan* cases. The sole point for decision in the *Lardner* case was the correctness of a charge to the effect that the jury might find that the defendants had acted

in bad faith if they had reason to be suspicious of the title of the person presenting the bonds. This was held to be erroneous and would be erroneous under the express provisions of the Negotiable Instruments Law. The language upon which the majority relies represents only a general statement of the rule which is established by the first sentence of Section 59 of the Negotiable Instruments Law that every holder is "deemed prima facie, to be a holder in due course;". The *Lardner* case seems not to have been accepted in the courts as authority for the proposition that defendants are relieved of the burden of establishing all elements of holding in due course when prior defect of title has been shown by evidence of theft or other circumstances. This is clearly evidenced by the opinion in the *Kean* case, where the *Lardner* case is cited immediately preceding the language quoted above as to the burden of proof. It is indicated also by the words of this Court in *Commissioners of Marion County v. Clark,* 94 U.S. 278, at page 285:

> "Holders of such instruments, under such circumstances, are not obliged to show that they paid value for the instrument *until the other party has clearly proved* that the consideration was illegal, or that it was fraudulent in its inception, or *that it has been lost or stolen* before it came to the possession of the holder. *Wheeler v. Guild,* 20 Pick., 551; *Collins v. Martin,* 1 Bos. & P., 648; *Miller v. Race,* 1 Burr., 452; *Peacock v. Rhodes,* 2 Doug., 632." (Italics supplied.)

Applicable general principles indicate also that one who asserts that he is a holder in due course should have

the burden of proving the defense. The defense is an affirmative one and, what is more important, the facts bearing upon the defense lie peculiarly within the knowledge of the person asserting the defense. See *Fleming v. Harrison,* 162 F. 2d 789 (C.C.A. 8th, 1947), and cases there cited.

4. *As is pointed out in the dissenting opinion, the decision below is contrary to the language of this Court in Smyth v. United States, 302 U.S. 329, which indicates that when a Government bond is called for redemption it becomes a fully matured obligation.* If this is correct, no defense was available to the defendant-respondents, who did not acquire the bonds until four and one-half years after the accelerated maturity.

It is seriously doubted that the case of *Morgan v. United States,* 113 U.S. 476, upon which the majority relies, establishes a rule contrary to what seems to have been decided in the *Smyth* case. The important difference between the *Morgan* case and the case at bar, as a matter of both practical reality and legal theory, is the great difference in the amount of time which elapsed between the call date and the transaction in the bonds. In the *Morgan* case the bonds were acquired within three months of the effective date of the call, whereas in the case at bar the acquisition was almost four and one-half years after the call. As a matter of legal principle, a period of three months might well be considered a reasonable time for the equivalent of demand paper to remain in circulation; but four and one-half years certainly may not be so regarded.

Conclusion

The fact that the court below had this case reargued before its full bench, and that it divided four to three in its decision, shows the importance and difficulty of the problem involved. That problem should be resolved by this Court in its capacity as the arbiter of the Federal System.

For these reasons this Petition for Writs of Certiorari should be granted.

Respectfully submitted,

ROBERT L. KIRKPATRICK
JOHN G. BUCHANAN
ERWIN N. GRISWOLD
Attorneys for Petitioner

December 19, 1955.

APPENDIX A

I.

28 U.S.C. §1652. State laws as rules of decision.

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply. June 25, 1948, c. 646, 62 Stat. 944.

II.

Section 59 of the Pennsylvania Negotiable Instruments Law, Act of May 16, 1901, P. L. 194, Pa. Stat. Ann. Tit. 56, §139 (1930).

§139. Burden of proof when title is defective.

Every holder is deemed prima facie, to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as holder in due course. But the last mentioned rule does not apply in favor of a party who became bound on the instrument prior to the acquisition of such defective title. (1901, May 16, P. L. 194, ch. I, art. IV. §59.)

APPENDIX B

Memorandum Opinion and Order

OPINION

WILLSON, D.J.

This case might be termed the civil aftermath of the criminal case tried by Judge Marsh in this Court and reported as *United States v. Rocco,* 99 F. Supp. 746, affirmed *per curiam* by the Court of Appeals, 193 F. 2d 1008. One phase of the litigation relating to the disappearance of bonds from plaintiff's bank was before Judge Gourley on a motion for summary judgment and is reported in *National Surety Corp. v. First National Bank in Indiana,* 106 F. Supp. 302. The verdict of the jury was in favor of plaintiff in the amount of $57,600.00 against each of the three defendants, which was the face value of the bonds. The jury did not award any interest.

Defendants Gilbert S. Parnell and the First National Bank in Indiana ("Bank in Indiana") have motions pending for judgment N.O.V. and for a new trial. Defendant Arthur A. Rocco filed similar motions but withdrew them at the argument. Parnell and the Bank in Indiana insist that there was insufficient evidence to go to the jury and that the burden as to good faith was on the plaintiff throughout the case. Plaintiff's evidence indicated that the bonds in question were stolen from its bank on May 2, 1944. This point was left to the jury in the charge. The bonds were handed to the Bank in Indiana by Parnell and were, by the Bank in Indiana, forwarded to the Federal Reserve Bank by letter for collection. Neither Parnell nor the Bank in Indiana claimed to be a holder in due course within the

definition of that term in the Negotiable Instruments Act, 56 P. S. 132. At the close of plaintiff's evidence, a motion by the Federal Reserve Bank of Cleveland for a directed verdict in its favor under Rule 50(a) was granted. Plaintiff at argument indicated that it would not pursue that matter further so that under the present record the Federal Reserve Bank of Cleveland is dismissed finally from the case. The case was tried on the theory that the evidence indicated that the bonds were stolen from the plaintiff and that the defendants Parnell and the Bank in Indiana, not having paid anything of value for the bonds, were under the duty of showing that they acquired possession of the bonds innocently and in good faith and that in the trial the burden rested on them to show good faith. With respect to the trial procedure, especially in regard to the burden of proof, this Court followed the principles enunciated in *First National Bank of Blairstown v. Goldberg,* 340 Pa. 337. The question as to whether defendants Parnell and the Bank in Indiana acted innocently and in good faith was for the jury. The jury has spoken and it is believed that the verdict is just and proper under the evidence presented. In the opinion of the Court substantial justice is done by the jury's verdict. The motions will be refused.

Plaintiff presented a motion to amend the judgment by adding to the $57,600.00 principal, interest at six per centum on the various amounts which made up the jury's verdict. The matter of interest was left to the jury under the charge. It was indicated to the jury that it might give interest from the date of the loss of the bonds to the date of the verdict and fix the

rate of interest. It is pointed out that the claim of plaintiff was unliquidated until the verdict. It is believed that the question of interest is discretionary and again the Court is not disposed to disturb the finding of the jury. Accordingly, the motion to amend the judgment in this respect will be refused.

ORDER.

AND NOW, this 16th day of November, 1954, it is ORDERED:

1. Motions of defendant Gilbert S. Parnell for judgment N.O.V. in his favor and for a new trial are refused; and

2. Motions of the First National Bank in Indiana for judgment N.O.V. in its favor and for a new trial are refused; and

3. Motion of plaintiff, Bank of America National Trust and Savings Association to amend the judgment to include interest at six per centum per annum on the amount of the jury's verdict is also refused.

JOSEPH P. WILLSON,
United States District Judge.

APPENDIX C

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 11,526

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION

v.

ARTHUR A. ROCCO, GILBERT S. PARNELL, FIRST NATIONAL BANK IN INDIANA, and FEDERAL RESERVE BANK OF CLEVELAND

FIRST NATIONAL BANK IN INDIANA, Appellant

On Appeal from the United States District Court for the Western District of Pennsylvania

Present: BIGGS, Chief Judge, and MARIS, GOODRICH, MCLAUGHLIN, KALODNER, STALEY and HASTIE, Circuit Judges.

Judgment

This cause came on to be heard on the record from the United States District Court for the Western Dstrict of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby reversed, with costs, and the cause remanded with instructions that judgment be entered for the First National Bank in Indiana.

BY THE COURT,

STALEY,
Circuit Judge.

October 14, 1955

Appendix C.

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 11,536

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION

v.

ARTHUR A. ROCCO, GILBERT S. PARNELL, FIRST NATIONAL BANK IN INDIANA, and FEDERAL RESERVE BANK OF CLEVELAND

GILBERT S. PARNELL, Appellant

On Appeal from the United States District Court for the Western District of Pennsylvania

Present: BIGGS, Chief Judge, and MARIS, GOODRICH, MCLAUGHLIN, KALODNER, STALEY and HASTIE, Circuit Judges.

Judgment

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby reversed with costs, and the cause remanded with instructions that a new trial be granted to Gilbert S. Parnell.

BY THE COURT,

STALEY,
Circuit Judge.

October 14, 1955.

JAN 2 1 19
HAROLD B. WILLE

IN THE

SUPREME COURT OF UNITED STATES

OCTOBER TERM, 1955

No. ~~579~~ 21

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION,

Petitioner,

GILBERT S. PARNELL

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

B. B. McGINNIS
ATTORNEY FOR RESPONDENT
Gilbert S. Parnell

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ARGUMENT

It will be noted that although these cases against the four original defendants were tried together for the sake of convenience, they were separate and distinct suits, and when appeals were taken by the present defendants, First National Bank in Indiana and Gilbert S. Parnell, they took separate numbers in the Court of Appeals for the Third Circuit, and the petitions for the writs of certiorari filed by the plaintiff below show that situation as continuing.

As to the other defendants, the Federal Reserve Bank of Cleveland and Arthur Rocco, this issue has been finally determined. Although there was a verdict against Rocco in the court below, no appeal was taken. At the conclusion of the plaintiff's testimony, the trial judge granted the defendant, Federal Reserve Banks, motion for a voluntary dismissal with prejudice for the reason that the said bank was an arm of the Federal government. With this action of the court, we were and still are in complete accord, but not for the reason assigned by the trial judge. The defendant, Federal Reserve Bank, is a corporation and may sue and be sued as a defendant and likewise it is not immune to suit because it appears to be an arm of the Federal government. The United States and any of its dependent branches may be sued, in like manner as a private concern or individual, and this is an almost daily occurrence. (recently Dickson-Yates).

The Federal Reserve Bank was entitled to an involuntary dismissal with prejudice because in redeem-

ing the bonds, it was performing a solely ministerial act; one that it was bound to do under the rules and regulations of the Treasury Department, governing such redemptions. The complaint alleged conversion and no such an offense was proven. When the bonds were presented after being called for redemption, the bank had no alternative but to pay in accordance with the tenor of the bonds and the treasury regulations. It could not negotiate, it could not bargain, it could not fix the price, nor could it refuse to redeem. There was nothing in the record to justify the suit as to the Federal Reserve Bank unless it was the notice it had received that the said bonds were missing or stolen, some four and a half years prior to the actual redemption.

The Plaintiff's position in support of its petition for a certiorari is that in entering a judgment for the Indiana bank, the Court of Appeals, Third Circuit, violated Federal rules of Decision 28 U. S. C. Sec. 1652 and Section 59 of the Pennsylvania Negotiable Instruments Law (Act of May 16, 1901, P. L. 194, P. S. 56, Sec. 139), both of which may be found in petitioners argument, Appendix A, page 28 and which for the sake of brevity will not be here quoted.

These same statutes are also cited in support of the writ of certiorari against Gilbert S. Parnell although as to him no final order was entered by the Court of Appeals. A new trial was granted to him and this is purely an interlocutory order. We have always understood that such an order, being interlocutory cannot be successfully appealed, and if that rule is sound, it should end this matter as to Parnell and the petition

for the writ should be dismissed. Furthermore the granting or not granting of a new trial is a discretionary matter and a court may not be convicted of error in the granting or failing to grant such a motion in the absence of a clear abuse of discretion. We submit that no such situation presents itself in the instant case.

We have had the advantage of reviewing the answer of the First National Bank in Indiana, plaintiff, in opposition to plaintiff's argument and to the part thereof dealing with situations and conditions under which writs of certiorari have been allowed and refused. We believe it covers that phase of this particular issued and adopt it as our own.

As to the Federal rules of Decision (28 U. S. C., Section 1652).

A reading of the questions presented by the plaintiff (Page 2 of the petition) would indicate that no Federal question whatsoever was involved, that it was simply a question of conversion by private individuals of the property of private persons and the only reason for Federal jurisdiction was the diversity of citizenship and that therefor Federal rules of Decision and Section 59 of the Pennsylvania Negotiable Instruments Law, supra, declared the law in the case.

DOES THE FEDERAL RULES DECISION ACT APPLY?

Defendant Parnell says no. The bonds were United States government bonds. The Federal Reserve Bank of Cleveland was an arm of the government and the redemption of the bonds was carried out strictly in ac-

cordance with Circular 300, Treasury Rules and Regulations, which of course have the force and effect of law (Trial Appendix 257 (a) and 259 (a).

Erie Railroad v. Tompkins, 304 U. S. 64 (pages 7 and 20 of petition) citing Swift v. Tyson is relied upon as authority for the proposition that the laws of Pennsylvania (Section 59, Penna. Negotiable Instruments Law, supra,) control this action. We submit that case offers no field for the application of the principle here sought by the plaintiff. In the Tompkins case the plaintiff a trespasser walking longitudinally along the tracks of the defendant company in Pennsylvania was injured as a result of being struck by a loose and swinging door on one of the cars. *Under the law of Pennsylvania,* under such circumstances there was no duty owing to the trespasser by the railroad other than to inflict no wanton or intentional injury upon him. *There was no Federal law on the subject.*

A recovery was had in the United States District Court for the Southern District of New York which was sustained on appeal to the Circuit Court, and on a writ of certiorari to the Supreme Court being allowed the decision was reversed and the *law of Pennsylvania* applied because *there was no Federal law* on the subject. Of course it was impossible to prove wanton or willful and intentional acts of negligence on the part of the defendant's employees.

The instant case presents an entirely different situation. Here bonds of the United States were al-

leged to have been converted. The Treasury regulations, which have the full force and effect of law, were introduced as part of the plaintiff's case. The manner in which the bonds were deposited by the defendants for redemption were in strict accord with the Treasury Department regulations and the Federal laws.

THE PENNA. N. I. STATUTE, SEC. 59

It needs but a passing glance to establish that Section 59 of the Negotiable Instruments Law of Pennsylvania has no application whatsoever to the issue here raised. That Act provides that *every holder is deemed prima facie to be a holder in due course;* but when it is shown that the title of any person who has *negotiated* the instrument was defective, the burden is on the *holder.xxx* No one at any time during the trial of the cause or in the appellate court ever seriously charged either the bank in Indiana or the defendant Parnell with being holders for value.

The position of the defendants was that they were mere agents or conduits who deposited the bonds for redemption in strict compliance with the Treasury rules and regulations, and that neither had any interest whatsoever, in the bonds or proceeds of the redemption and were never holders for value.

In the trial appendix 260 (a) we find this statement by the trial judge:

> Plaintiff's evidence also shows defendant Parnell, the bank in Indiana, took these bonds not as holders in due course for value but as a conduit or as an agent for the purpose of passing them on

to the Federal Reserve Bank of Cleveland for redemption."

Again on page 264 (a) of the trial appendix we find this statement by the trial judge:

> "That is the crux of this case. That is what we are confronted with, the ruling that is to be made on that, the plaintiff having rested. I say very frankly if you were a holder in due course for value at this stage of the record with the proof on hand your position would be correct. I think you would be entitled to a dismissal."

The record contains other statements of like tenor by the trial judge.

Nowhere in the Complaint is there any allegation to the effect that the defendants *negotiated* the bonds in question. The only expression used is the word *converted.* In the presentment of its case to the court the court the plaintiff submitted a memorandum devoted to this proposition:

> "Plaintiff will establish (1) proof of its ownership, and (2) subsequent loss of the bonds, and (3) the receipt and negotiation thereof by the defendants a prima facie case of conversion against each of the defendants."

It is our position that negotiation of said bonds by the defendant has not been established. If this is correct, then according to its argument plaintiff has failed to make out a case because there was no negotiation of the bonds in this case. Presentment for *redemption* certainly does not include *negotiation.* In redeeming the bonds the Federal Reserve Bank was powerless to set price conditions or offer any other arguments usually

found where securities are negotiated. As heretofor suggested, it was its duty to pay in conformity with treasury rules and regulations. Had it known that the bonds had been missing or stolen, of course, it would have been duty bound to notify the proper authorities, but there are many cases where payments and redemptions of lost or stolen bonds have been made after notice of the infirmity had been received, and liability has followed.

The following cases amply sustain this proposition:

Governmental et al v. National Security Co., 173 N. E. 682 (N. Y. Court of Appeals).

Graham v. White-Phillips Co., 296 U. S. 27.

Pratt v. Higginson, 119 N. E. 661.

We do not deem that matter relevant in the present matter and therefor do not quote from the decisions.

It is respectfully submitted that according to plaintiff's own yardstick as hereinabove mentioned it failed to prove an essential part of their case; viz. the *negotiation* of the bonds in question.

> "Instruments are 'negotiated' to purchasers. Instruments are not usually negotiated to principal debtors and other payors but are delivered up, or surrendered, to the payor."

Britten Bills and Notes (1943), page 1035; *Daniels on Negotiable Instruments*, 7th Ed., 122; South Boston

Trust v. Levin, 143 N. E. 816; Shammas v. Boyett, (114 Cal App. 2d 139,) 249 P. 2d 880; National Bank of Commerce v. Seattle National Bank, 187 P. 342; Wells Fargo Bank v. Bank of Italy 4 P. 2d 781.

Beutel's Brannan, Negotiable Instrument Law, 7th Ed., page 108, is the best exposition of this proposition that have been able to find. Since it is in a textbook, we are going to take the liberty of quoting from it.

> "(b) *Cases Where the Federal Law Applies.* There is a well established field outside of the Conformity Act where the Federal Courts have never felt themselves bound to follow state statutes. The Conformity Act itself simply says: 'The laws of several states, except where the Constitution, treaties, or statutes of the United States otherwise require, or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply.'
>
> "In all of those situations where Federal courts, or for that matter, state courts, deal with paper issued by the federal government or agencies created under the Federal Constitution and statutes, the cases lie outside the field of the Conformity Act, and the law in such cases flows from the Constitution, the federal statutes, delegated legislation in the form of department rules and orders, and sometimes from decisions of quasi-judicial administrative agencies. These taken as a whole may establish a set of rules completely different from those codified in the N. I. L. which has not been adopted by the Congress as a federal law.
>
> "Where all of the above sources are silent the Federal courts have consistently held that although state decisions and interpretation of the N. I. L. may be evidence of the general federal law involved, *they are not binding on the Federal Courts and they may decide the cases on what they believe to be the rules of justice in the particular*

facts citing Clearfield Trust Company v. United States, 318 U. S. 336). Thus there is a large and growing field of negotiable instruments law wholly outside the N. I. L. and the rules of uniformity which it intends to set up. (*Emphasis supplied*).

"Until Congress adopts the act, this situation may be expected to continue. The N. I. L. is, of course, part of the Code of the District of Columbia and governs commercial transactions in that area. However, it does not seem to have been applied to government business originating there and probably was not intended so to apply.

"Even if the N. I. L., or a similar uniform statute, were to be adopted by the Federal Government to cover federal and other fields where the federal law carries precedence, there would still remain the problem of reconciling results with other federal statutes and agency rulings given under proper delegation of authority. These, of course, would tend to prevent uniformity of results with cases dealing with only private commercial paper."

In conclusion we submit that the application to the issue and the sales of these United States Bonds of a state law would lead to a great diversity of rules regulating title and redemption, and would subject the entire financing plan of the Federal government to exceptional uncertainty by making identical transactions subject to the vagaries of the several states.

It is unthinkable that the law of any state could be invoked to determine any issue in which a Government bond was of vital importance. The attractiveness of these issues is primarily because of the sound value back of them, and in addition to that facility with which they may be transferred. Passing by delivery,

they are quickly convertible into cash or accepted in lieu of money and are a ready medium of exchange.

It is respectfully submitted that the writ of certiorari as prayed for should be denied.

Respectfully submitted,

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FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. ~~580~~ 22

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION,

Petitioner,

v.

FIRST NATIONAL BANK IN INDIANA, PA.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

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OCTOBER TERM, 1955

No. 580

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION,

Petitioner,

vs.

FIRST NATIONAL BANK IN INDIANA, PA.,

Respondent.

Reply Brief in Behalf of First National Bank in Indiana in Opposition to Petition for Writ of Certiorari.

Counter-Statement of Facts.

This case was brought by petitioner as plaintiff against four defendants. The Complaint charged each defendant separately with the conversion of Home Owners' Loan Corporation bonds, payable to bearer, as the property of plaintiff. No charges of conspiracy were alleged or made against the defendants (see Complaint, Applt's App. 20a-23a). The case against one of the defendants, Federal Reserve Bank of Cleveland, was dismissed on motion at the close of plaintiff's case (Applt's App. 285a-300a and 341a). The trial Court submitted the case to the jury as three separate cases against the remaining defendants

(Applt's App. 429a). Three separate verdicts were rendered against these defendants and judgment entered thereon (Applt's App. 439a). Respondent, First National Bank in Indiana, Pa. took its appeal from the judgment against it to U. S. Court of Appeals, at No. 11,526. The Court of Appeals, by a majority of its members, reversed the judgment against First National Bank in Indiana and directed the District Court to enter judgment in its favor. The Petition for Writ of Certiorari, so far as this *respondent is concerned*, is to review this decision of the Circuit Court of Appeals.

We make the foregoing counter-statement for the purpose of accuracy, and to avoid the confusion as a result of petitioner's failure to allocate the relevant material facts to each of the defendants *separately*. For a further accurate statement of relevant material facts applicable to this respondent, First National Bank in Indiana, we respectfully refer this Honorable Court to the fair and comprehensive statement of the facts as they appear in the majority opinion of the U. S. Court of Appeals.

Argument in Behalf of First National Bank in Indiana Against the Granting of a Writ of Certiorari.

This case on appeal was argued before Goodrich, McLaughlin and Staley, JJ. on April 19, 1955. The Court, *of its own volition*, ordered a re-argument on June 16, 1955 before the Court *en banc*, consisting of Biggs, P. J., Maris, Goodrich, McLaughlin, Kalodner, Staley and Hastie, JJ. The majority decision was by Biggs, P. J., Maris, Staley and Hastie, JJ. No motion for re-argument was made by petitioner after this decision was rendered.

The jurisdiction of this Court is sought by petitioner "under 28 U. S. C. A., Section 1254 (1)". In the case of Stamey v. United States, 37 Fed. (2nd), 188, 190, (December 11, 1929) is stated the reasons given by the Senate Judiciary Committee for recommendation of Section 240 of the Judicial Code (which was replaced by the Act of June 25, 1948, 28 U. S. C. A. Section 1254 (1) and on which the Act of June 25, 1948 was based) as follows:

> "The central thought is this, that litigants have, first, a trial in the District Court, and then by appeal or writ of error, a trial in the Circuit Court of Appeals —a court that ranks as high or higher than the Supreme Tribunal of the States. It is our belief that here ordinary litigation should end, and that the case should not go to the Supreme Court of the United States unless the questions involved are of grave public concern, or unless serious uncertainty attends the decisions of the Circuit Court of Appeals, by the reason of conflict in the rulings in these courts or the courts of the states".

The specific considerations governing review on certiorari are to be found in Rule 19 of the Supreme Court Rules, 28 U. S. C. A. Supreme Court Rule 19.

If this case is to come within the jurisdiction of this Court, the decision to be reviewed must be either

(a) In conflict with decisions of other Circuit Courts, or

(b) Must involve important matters of public interest.

Magnum Import Co. v. Coty, 262 U. S. 159 (May 7, 1923);

Forsythe v. Hammond, 166 U. S. 506 (April 19, 1897);

National Metropolitan Bank v. U. S., 323 U. S. 454, 456 (Dec. 13, 1944);

Rice v. Sioux City Memorial Park Cemetery, 349 U. S. 7 (May 9, 1955).

In the opinion of the Court in the case of Magnum Import Co. v. Coty, *supra*, the Court, on page 163, states the following:

> "The question how the court shall exercise this power next arises. Jurisdiction to bring up cases by certiorari from the Circuit Courts of Appeals was given for two purposes, first to secure uniformity of decisions between those courts in the nine circuits, and, second, to bring up cases involving questions of importance which it is in the public interest to have decided by the court of last resort. The jurisdiction was not conferred upon this court merely to give the defeated party in the Circuit Court of Appeals another hearing.
>
> • • •
>
> "The petition should, in the first instance be made to the Circuit Court of Appeals which with its complete knowledge of the case may, with full consideration, pass on it. That court is in a position to judge first whether the case is one likely under our practice to be taken up by us on certiorari."

The Court, in its opinion in the case of National Metropolitan Bank v. U. S., *supra*, states on page 456, the following:

> "Only recently in Clearfield v. U. S., 318 U. S. 363, we had occasion to consider rights and liabilities of the government which stem from the issuance of commercial paper. Our conclusion was that legal questions involved in controversy over such papers are to be resolved by application of federal, rather than local law, and that in the absence of an applicable Act of Congress, federal courts must fashion the governing rules."

In the case of Rice v. Sioux City Memorial Park Cemetery, Inc., *supra*, decided May 9th of 1955, the majority opinion by Mr. Justice Frankfurter states with reference to the issuing of a writ of certiorari, on page 74 as follows:

> "A federal question raised by petitioner may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this court does not sit to satisfy a scholarly interest in such issues, nor does it sit for the benefit of particular litigants. (Magnum Import Company v. Coty, 262 U. S. 159, 163; see also address of Chief Justice Vinson before the American Bar Association Sept. 1949, 69 Sup. Ct. v., VI; address of Mr. Chief Justice Hughes before American Law Institute May 10, 1934 XI Proc. Am. Law Inst. 313). 'Special and important reasons' imply a reach to a problem beyond the academic or sporadic. This is especially true where the issues involved reach constitutional dimensions, for then there comes into play regard for the court's duty to avoid discussions of constitutional issues unless avoidance becomes evasive."

In view of the foregoing authorities, we respectfully submit that there is no possible grounds for a conflict of decisions with other circuits concerning the "rights and liabilities" of this respondent, First National Bank in Indiana, in this case, nor is there a "matter of public interest involved." The decisions of the United States Supreme Court as are fully stated and discussed in the majority opinion of the Court of Appeals have stated clearly the law as to United States Government paper.

The Court of Appeals was required to follow the Federal Law as determined by the United States Supreme Court. Schwarz v. Witwer Grocer Co., 141 Fed. 2nd. 341 (8th Circuit Mar. 20, 1944; re-argument refused Mar. 30, 1944; certiorari denied May 29, 1944, 322 U. S. 753).

We do not here discuss the merits of the case because they are fully stated in the opinion of the Court of Appeals and are not at this time at issue. Counsel for First

National Bank in Indiana, Pennsylvania therefore respectfully submit that certiorari should be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

NO. 21

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, Petitioner

v.

GILBERT S. PARNELL, Respondent

NO. 22

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, Petitioner

v.

FIRST NATIONAL BANK IN INDIANA, Respondent

On Writs of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR PETITIONER

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On Writs of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the district Court (R. 445-448) is unreported. The opinion of the Court of Appeals (R. 496-504) and the dissenting opinion (R. 505-516) of Judge Goodrich for the minority are reported in 226 F. 2d 297.

JURISDICTION

The judgments of the Court of Appeals were entered October 14, 1955 (R. 517-518). The petition for writs of certiorari was filed December 20, 1955, and was granted February 27, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the rule announced in *Clearfield Trust Co. v. United States,* 318 U.S. 363, with respect to the rights of the United States on one of its checks, is to be extended to a case arising under diversity jurisdiction and involving only the rights of private parties with respect to the ownership of bonds of an instrumentality of the United States?

In other words, in a diversity case, is the question whether a private defendant converted bonds of an instrumentality of the United States, in Pennsylvania, to be governed by the law of Pennsylvania or by a "federal" law?

2. Assuming that the question of conversion of bonds of an instrumentality of the United States, as between private parties, is to be governed by "federal" law, is the source of that federal law (with respect to such issues as burden of going forward with evidence of good faith and dealing with the bonds after maturity) to be found in old federal decisions or in the provisions of the Negotiable Instruments Law which has been enacted in every state of the Union and by Congress for the District of Columbia?

3. Where theft or defective title has been shown, does not the one who asserts the defense of bona fide purchaser have the burden of proving the defense, under both federal decisional law and the Negotiable Instruments Law of Pennsylvania?

4. May one who takes bonds of an instrumentality of the United States four and one-half years after they have been called and with notice of the call claim the rights of a holder in due course?

STATUTES INVOLVED

The statutory provisions involved are the Rules of Decision Act, 28 U.S.C. §1652; and Section 59 of the Pennsylvania Negotiable Instruments Law, Act of May 16, 1901, P.L. 194, Purdon's Pa. Stat. Ann. Tit. 56, §139 (1930). They are printed in Appendix A. *infra,* p. 46.

STATEMENT

This was a civil action brought by petitioner in the District Court to recover for the conversion of $57,600 principal amount of 3% Series A bearer bonds of Home Owners' Loan Corporation. The jurisdiction of the District Court was invoked on the basis of the diverse citizenship of the parties under 28 U.S.C. §1332.

The bonds here involved were part of a larger group of Home Owners' Loan bonds which had been purchased by petitioner and which were stolen by sneak thieves in May, 1944 while they were being prepared by petitioner's clerk for transmission for payment (R. 32-92). Notice of the loss or theft of the bonds, including the serial numbers of the bonds, was disseminated promptly throughout the United States (R. 93-114).

In September of 1948 the defendant Rocco turned over to the defendant-respondent Parnell, who was a lawyer, $25,000 of stolen West Penn Power Company and United States Treasury bonds (R. 467-475). Parnell took them to the defendant-respondent First National Bank in Indiana, Pa., and the bank, acting through its cashier, disposed of them and gave Parnell a check, which he immediately endorsed and surrendered for currency (R. 467-469, 479-480; 313-314, 348-349).

Eighteen days after this transaction, Parnell brought into the defendant bank $19,600 of the Home Owners' Loan bonds here in suit, and twenty-seven days later brought in the remaining $38,000 of bonds, all of which he had received from Rocco in Pennsylvania (R. 13-14, 303-306). These bonds had been called for payment in 1944 (R. 64) and eight overdue coupons, representing four years' interest, were attached to each bond (R. 175). In each instance Parnell dealt with the cashier, the same man as before, who knew that the Home Owners' Loan bonds had been called for redemption as of a date almost four and a half years earlier (R. 468-469, 313-314, 343).

The defendant bank sent the first group of Home Owners' Loan bonds to the Federal Reserve Bank branch in Pittsburgh for redemption (R. 153, 171, 334-337). The cashier telephoned Parnell when a credit advice was received from Pittsburgh, and Parnell thereupon went to the bank and received a cashier's check, which he immediately cashed at the bank, taking the proceeds in currency in bills of $100 and smaller (R. 316-319, 344). Parnell took the currency to his office, telephoned Rocco that it was there, and paid him in currency. No receipts were given for the bonds; in fact, there were no receipts, correspondence, checks or writings given or received by Parnell except cashier's checks, which he cashed immediately on receipt (R. 311-313).

The $38,000 of bonds involved in the last transaction were handled in the same way, Parnell dealing with the same cashier and turning the cashier's check into small denomination bills immediately upon its receipt (R. 318, 345).

The defendants' attempt to prove their good faith was based almost entirely, if not exclusively, on the testimony of Parnell and of the bank's cashier. The credibility of the defendant Parnell was impeached by his own prior inconsistent testimony in another proceeding (R. 472-478) and also by the testimony of an F.B.I. Agent (R. 319, 371-375) and of the defendant Rocco (R. 482-483, 489-492). The testimony of the cashier, Straitiff, is conflicting in itself (R. 345-346) and also in conflict with the testimony of F.B.I. Agent Myers (R. 345, 353, 381). His credibility was impeached generally by the introduction of the record of his conviction of embezzlement from the defendant bank (R. 390-393).

The jury has indicated by its verdicts that the defendants' testimony, with respect to their good faith, was not believed. The District Judge who also saw and heard the witnesses has said (R. 447): "The question as to whether defendants Parnell and the Bank in Indiana acted innocently and in good faith was for the jury. The jury has spoken and it is believed that the verdict is just and proper under the evidence presented." And Judge Goodrich in his dissenting opinion concluded (R. 513; 226 F. 2d 307): "The facts do not tend to show the regularity and good faith of the transaction, the 'ordinary course of business' aspect of the things the parties were doing. Furthermore, the jury saw the witnesses."

The jury returned verdicts against each of three defendants and in favor of petitioner in the amount of $57,600 (R. 439), and judgments were entered thereon (R. 448). The defendants Gilbert S. Parnell and First National Bank in Indiana appealed. No appeal was

taken by Arthur A. Rocco, the third defendant against whom judgment was entered.

The Court of Appeals for the Third Circuit, after argument on the appeals, ordered a rehearing before the entire bench of seven judges. After this rehearing the judgments appealed from were reversed and the cause remanded upon the opinion of a majority of four members of the court holding that the questions were to be decided under federal law and that under federal law the respondents were not required to establish their defense of good faith purchasers. The court directed that judgment should be entered for the defendant First National Bank in Indiana for want of sufficient evidence of bad faith and a new trial granted the defendant Parnell because of improper instructions as to burden of proof of good faith. Three members of the court dissented in an opinion by Circuit Judge Goodrich.

SUMMARY OF ARGUMENT

I

This is a diversity case. It involves only the rights of private parties, arising out of the ownership of bonds guaranteed by the United States. Under this Court's decision in *Erie R. Co. v. Tompkins,* 304 U.S. 64, this question is to be decided according to the applicable law of the state where the operative events occurred and not under a "general federal law."

To conclude that a question of the sort here involved should be decided under a "general federal law" would involve constitutional questions pointed out in the *Erie* case itself, and alluded to last Term in *Bernhardt v. Polygraphic Co. of America,* 350 U.S. 198. There would be some question whether Congress could validly provide that such questions, arising between private parties, should be subjected to a federal law. That problem need not be faced, however, since Congress has in fact provided in the Rules of Decision Act (28 U.S.C., sec. 1652) that such questions shall be decided in accordance with "The laws of the several states, * * *"

In reaching its result, the Court below relied on this Court's decision in *Clearfield Trust Co. v. United States,* 318 U.S. 363. But that case was not a diversity case. There the United States was itself a party, and the right or cause of action there asserted was not a state-created right. The case involved liabilities on a government check. The law which authorized the issuance and payment of the check was the statutory law of the United States. It is one thing to say that the rights and obligations of the United States are to be

determined under its own law; it is a wholly different thing to say that the rights and liabilities of private parties are also to be decided by federal law although the United States has not, by statute or regulation, entered or in any sense occupied or pre-empted the field.

The distinction is well illustrated by the decision in *United States v. Guaranty Trust Co.*, 293 U.S. 340. That case involved a question of the ownership of an instrument. The Court did not decide it under any "federal" rule, but held that it was controlled by the local law of the place where the transfer had occurred.

The United States has never evidenced any interest in prescribing the rule which should be applied in litigation between private parties who deal in its bonds. The only statute relating to the bonds is completely silent as to the rights of owners and transferees, except that it is provided that the parties are to be free of certain taxes. Similarly, the Regulations issued by the Treasury Department are equally silent so far as the rights of owners and transferees are concerned. This suggests that the rights of owners and transferees as among themselves are of no vital concern to the United States. In the absence of such an interest, no reason is known why such questions should be determined by a nebulous federal law rather than by the applicable law of the states which would be applied to all other similar controversies between private parties.

Experience has shown that the effort to obtain uniformity through the development of a federal decisional law is not likely to succeed. Uniformity of law by the decisional process is slow at best. It is also illusory, unless this Court can be expected to have opportunity

for, and to devote its time to, the development of a law of negotiable instruments separate and apart from that contained in the Negotiable Instruments Law. The pressure of business on this Court means that it is only rarely that a negotiable instruments case can be heard here. Where Congress has not chosen to prescribe a uniform rule with respect to the transfer of government bonds, there is every reason why this Court should not undertake to do so. To attempt to do so would certainly lead to many years of great uncertainty in the field while this Court was fashioning, on a case by case basis, a law of negotiable instruments distinct from the states' statutory law.

II

If the question here involved is to be decided under federal law, the decision below is nevertheless wrong in determining the sources from which that law is to be drawn. This is well illustrated by this Court's decision in *Funk v. United States,* 290 U.S. 371. There, the Court recognized widespread statutory changes in the laws of the states, and held that the federal common law rule there applicable should be determined "in accordance with present day standards of wisdom and justice rather than in accordance with some outworn and antiquated rule of the past." As Judge Learned Hand has said in *New York, N.H. and H. R. Co. v. Reconstruction Finance Corp.,* 180 F.2d 241, 244 (C.C.A. 2nd, 1950): "However, the Negotiable Instruments Law has been enacted in every state of the Union, as well as in the District of Columbia; it is a source of 'federal law'—however that phrase may be construed — more complete and more certain, than any other which can conceivably be drawn

from those sources of 'general law' to which we were accustomed to resort in the days of Swift v. Tyson."

Thus, even if this is a question which is to be determined by a "federal general law", the source of that law should be found in the Negotiable Instruments Law enacted in every state of the union and by Congress for the District of Columbia rather than in decisions of this Court which were decided long before the movement for uniformity which led to the enactment of the N.I.L.

III

The defendants had the burden of proving their asserted defense of being holders in due course. Under the law of Pennsylvania, one claiming the rights of a holder in due course has, as against proof of a prior valid title, the burden of proving all of the necessary elements of his claim to be a holder in due course. This was settled Pennsylvania law prior to the enactment of the Negotiable Instruments Law, and is the uniform construction of Section 59 of the statute. This rule is one of the controversial matters which was resolved by the enactment of the Negotiable Instruments Law. It is the preferable rule, and has been adopted by a number of decisions in the Courts of Appeals, as well as in Pennsylvania. It is the rule which was applied by the District Court in this case, and its decision should be upheld.

IV

In any event, the transactions in the bonds were at such a time as to preclude the defense of bona fide purchase. The bonds here involved were dealt with by the defendants four and one-half years after they had been called for redemption, and with notice of the call.

They had eight uncashed interest coupons attached to them, covering interest for four years. They were handled and presented for redemption, which itself shows that the parties dealing with them knew that their face amount was now due. A person dealing with bonds under such circumstances is precluded, as a matter of law, from claiming the right of a holder in due course. Consequently, the judgments of the District Court should have been affirmed without regard to the question of choice of law or the proper rule as to the burden of proof.

In reaching a contrary conclusion, the Court below relied on the supposed authority of *Morgan v. United States,* 113 U.S. 476. We think that the *Morgan* case is readily distinguishable. First, that case arose under special circumstances. Congress had indicated that the bonds there involved continued to be negotiable. And, second, the bonds there involved were taken some three months after they had been called. Here the delay was four and one-half years after the call. Upon call, the bonds became in effect demand paper. It may well be that three months after call is within a reasonable period during which negotiability will continue. A delay of four and one-half years is certainly more than a reasonable period. Here the bonds showed on their face, because of the interest coupons attached, that they were long past due. The persons who dealt in the bonds, therefore, cannot assume the mantle of holders in due course. On this basis, no defense was offered or available to the defendants, and the judgments of the District Court should have been affirmed on this ground alone, and without passing upon the matter of the governing law or the proper rule with respect to the burden of proof.

> "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

There has been discussion as to whether or not this statute applies in non-diversity cases such as *Clearfield.*(1) It has never been doubted, however, that the statute is fully applicable where the jurisdiction of the federal court is based on diversity of citizenship. The Court of Appeals does not refer to or discuss this basic and fundamental statute. No basis is known for saying that this is one of the cases to which "the laws of the several states" do not apply so as to bring into effect the reservation at the close of the statute.

The comment in a recent note on the case at bar: "Federal Law Applied to Determine Rights of Private Holders of U.S. Government Bonds," 56 Columbia L. Rev. 438, 439-40 (1956) is in point:

> ". . . Rather than mechanically applying federal law, the instant court might well have directed its attention to whether Congress, in authorizing the issuance of the bonds, impliedly intended to have federal law control the rights of transferees of the bonds as among themselves. Such a finding would seem necessary in order to justify the application of federal law since the Rules of Decisions Act, as interpreted by *Erie R.R. v. Tompkins,* requires the federal courts to apply state law except where

(1) See *Clearfield: Clouded Field of Federal Common Law,* 53 Columbia L. Rev. 991 (1953).

otherwise required by the Constitution, statutes of the United States, or treaties.

"The real issue seems to be whether a failure to apply federal law exclusively would be inconsistent with a congressional purpose or policy. In most cases in which such congressional radiation was found, the rights and liabilities of the United States were in question. But it is difficult to ascertain a federal interest in the outcome of the instant litigation so substantial as to warrant finding an implied congressional intent that federal law be applied. A strong argument against such a finding is that purchasers of bonds would have to be acquainted with two sets of substantive law depending upon whether or not they were buying federal bonds. This, coupled with the often great difficulty of determining just what the federal substantive rule is, as was exemplified in the instant case, would seem to more than offset any possible federal interest in having a uniform rule apply to determine the rights of transferees of government bonds as between themselves. Accordingly, the court should have considered itself bound by the Rules of Decisions Act and have applied state law."

The mandate of the statute is even more demanding in this case than in *Erie*. The problem here is not between the law as established by coordinate courts as it was in *Erie,* but between federal decisional law and state statutory law. In *Burns Mortgage Co. v. Fried,* 292 U.S. 487, decided before *Erie,* this Court unanimously determined that in a case involving only the rights of private parties the statutory law of a state (there, as

here, the Negotiable Instruments Law) and the construction thereof by a state court of last resort could not be rejected in favor of federal decisional law, and that this was true whether the enactment was one which altered the common law or one which merely codified and declared it. In view of the decision in *Burns Mortgage Co.* it would seem proper to refer to the decision below as an extension of *Swift v. Tyson,* 16 Pet. 1, rather than as an extension of *Clearfield.* Certainly, in underlying philosophy and reasoning, the decision here is more a brother of *Swift v. Tyson* than of *Clearfield.* If the decision below is sound, then surely "the ghost of Swift v. Tyson, supra, still walks abroad." *Sampson v. Channell,* 110 F. 2d 754, 761 (C.C.A. 1st, 1940).

(c) *The essential basis of Clearfield.* It is submitted that the essential basis of *Clearfield,* which the court below would extend here to private litigation involving only the rights, as among themselves, of the owners of government bonds, is the fact that the right or cause of action there asserted was not a state-created right. The Government had issued a check which had been endorsed and collected by the defendant on a forged endorsement. The law which authorized the issuance and payment of the check was the statutory law of the United States. *Its* right to recover was dependent on the legal consequences to be attributed to the transaction in which *it* had engaged. Since the right to do the acts was dependent solely on federal law, this Court held that the consequences of the acts were to be determined by the same law. The application of state law would permit the states to limit and condition the legal rights of the United States, and make its rights de-

pendent on the will of the states, a situation objectionable under our dual system of government.

In the present case the question arises between private parties with respect to the ownership of property dealt with in Pennsylvania. The substantive right asserted is created by the law of Pennsylvania. To apply Federal decisional law to the determination of such a right, unless the Constitution or a federal statute so directs, serves no interest of the United States, and introduces an undesirable and fruitless diversity into the law governing private transactions in negotiable paper. It is one thing to say that the rights and obligations of the United States are to be determined under its own law; it is a wholly different thing to say that the rights and liabilities of private parties are also to be decided by federal law although the United States has not, by statute or regulation, entered or in any sense occupied or pre-empted the field.

In *Guaranty Trust Co. v. York,* 326 U.S. 99, Mr. Justice Frankfurter, speaking for the majority of the Court, carefully pointed out at page 109: "Here we are dealing with a right to recover derived not from the United States but from one of the States." Again, at page 112: "The source of substantive rights enforced by a Federal court under diversity jurisdiction, it cannot be said too often, is the law of the States."

The same doctrine is reaffirmed in the opinion of Mr. Justice Douglas (announced by Mr. Justice Reed) in *Ragan v. Merchants Transfer & Warehouse Co.,* 337 U.S. 530, at 533:

> "* * * But in the present case we look to local law to find the cause of action on which suit is

brought. Since that cause of action is created by local law, the measure of it is to be found only in local law."

Again as recently as *Bernhardt v. Polygraphic Company of America,* 350 U.S. 198, decided only a few months ago, this same fundamental distinction with respect to the law to be applied when the right of recovery owes its existence to one of the States and not to the United States has been emphasized. Mr. Justice Douglas at page 202 said: "We deal here with a right to recover that owes its existence to one of the States, not to the United States."

The cause of action in the case at bar is the ordinary tort action for conversion. No rights are asserted against the United States, or because of anything the United States did or failed to do. It was solely the transactions in which the defendant-respondents had engaged which were controlling with respect to the rights and liabilities of the parties. The legal consequences of their actions are matters for state law. In *Fashion Originators' Guild v. Federal Trade Commission,* 312 U.S. 457, 468, this Court said:

"* * *, whether or not given conduct is tortious is a question of state law, under our decision in Erie R. Co. v. Tompkins, 304 U.S. 64."

And a tort action for conversion is peculiarly a matter of state law. Such an action is based upon ownership of property and unlawful interference with the exclusive right of possession which flows from that ownership. Conversion results from "a distinct act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his title or

rights therein, or in derogation, exclusion, or defiance of such title or rights.": 53 Am. Jur., *Trover and Conversion*, §24, page 819. *U.S. v. Kramel*, — F.2d — (C.C.A. 8th, 1956)[1] is directly in point. It was an action brought by the United States against commission merchants to recover for the conversion of a cow included in a chattel mortgage given to the Farmers Home Administration, a governmental agency. The mortgage prohibited the sale of the mortgaged property without the consent of the mortgagee. The cow had been sold through defendants who had no notice of the violation of the covenant. The court held that, although the action was by the United States to enforce rights under a mortgage taken pursuant to an Act of Congress, state law was controlling. The court said:

> "The Government contends that, by the Farmers Home Administration Act (7 U.S.C.A.), it 'entered into nationwide transactions requiring uniform administration.' In many respects this claim is sound, but is that requirement broad enough to avoid entirely all application of State law to every and all situations and contingencies? *Setting to one side the question of constitutional power, is this Act to be construed as displacing State law governing or affecting titles to property and tort actions for claimed violation of property rights?*"
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> * * *
>
> "The present action is one in tort, for conversion of a chattel covered by the mortgage. Does this form of action affect the matter of uniformity of administration of this Act so as to manifest a

(1) C.C.A. 8th No. 15,320, decided June 20, 1956 and not yet reported.

congressional intention to remove it from the control of State law? *While trover is a tort proceeding, yet it is an action which is based upon and solely for the protection of a cardinal element of property—possession.* It is an unlawful appropriation of personal property to the legal damage of the rightful possessor. We think this character of action cannot be presumed or construed to be within the purview of this legislation as a matter to be governed by it. There is no element of harmonious administration of the Act involved therein. Such remedies are much the same in the different States but this very litigation is illustrative of the existence of differences. *There should be substantial, if not compelling, reasons to warrant construction of an Act of Congress as replacing State tort laws affecting property rights.* We see none such here." (Emphasis supplied.)

(d) *The decision below is contrary to the essential basis of this Court's decision in United States v. Guaranty Trust Co.*, 293 U.S. 340. That case involved a check of the United States drawn in the District of Columbia and sent by mail to Yugoslavia. It was there transferred by forged endorsement and in due course reached the Guaranty Trust Company, under further endorsements. The Guaranty Trust Company presented it to the United States, and received payment. When the forgery was discovered, the United States sued the Guaranty Trust Company. The decision went against the United States, and it went that way on the ground of ownership of the instrument. The Court looked to the law of Yugoslavia, where the instrument was transferred under the forged endorsement. It found that under the law of Yugoslavia

a transferee in due course, despite the fact that the endorsement was forged, acquired a good title. Consequently, it held that when the Guaranty Trust Company received the check in the United States, it, too, acquired a good title, and, as owner, was entitled to keep the payment which it had received when it gave up the instrument.

The important thing to note here is that the *Guaranty Trust* case was not decided under any supposed "federal" rule. The Court held that the result in the case turned on the ownership of the instrument, as between private parties. It decided that question of ownership in accordance with the local law of the place where the transfer had occurred. That local law was different from any law in effect in the United States. Nevertheless, it was held applicable and controlling in determing the ownership of this instrument, which was a Government check.

It is true that in the *Guaranty Trust* case the check was addressed to Yugoslavia, and the Court said that "It was thereby given something of the quality of a foreign bill; * * *." 293 U.S. at 346. What this apparently means is that the United States sent the check into Yugoslavia and must therefore be deemed to have consented to the application of Yugoslav law, or at least must have understood that Yugoslav law might be applied to questions of transfer of the check. In the present case, the bonds were issued in the United States, and the United States intended that they should circulate throughout the United States, in each one of which the Negotiable Instruments Law is in force. In the absence of a specially prescribed "federal" rule, it seems appropriate to say that the United States understood that

these bonds would circulate in the United States in accordance with the provisions of the Negotiable Instruments Law, so far as ownership by private parties is concerned, just as it was held that the ownership of the check involved in the *Guaranty Trust* case was subject to the law of Yugoslavia when it was sent there.

The decision below is, in principle and in substance, contrary to the basis of this Court's decision in the *Guaranty Trust* case in determining the law applicable to the effect, as between private parties, of the transfer of a Government instrument.

The proper spheres of *Clearfield* and *Guaranty Trust Company* are clearly and concisely delineated in the dissenting opinion (R. 505; 226 F. 2d 303) where Circuit Judge Goodrich said:

> "We think that the Clearfield Trust case has this much to do with the set of facts here and no more. This was a bond issued by the United States or by a government corporation under its authority. The nature of the obligation, we think, is controlled by United States law and the rights and duties of the United States as a party is a matter for federal legislation and regulations. We do not think that the rights of transferees among each other in a transaction taking place in Pennsylvania is a matter of federal law at all but is governed by the law of the state where the operative facts occurred. See Clearfield Trust Co. v. United States, *supra* at 367. See also United States v. Guaranty Trust Co., 293 U.S. 340, 346 (1934)."

Reference may also be made to the long established rule that, though a question of the validity or infringement of a patent is within federal jurisdiction, a question

involving the transfer or assignment of patent rights does not present a federal matter. *Luckett v. Delpark, Inc.*, 270 U.S. 496; *Wade v. Lawder*, 165 U.S. 624; *Wilson v. Sandford*, 10 How. 99.

See also *Willcuts v. Bunn*, 282 U. S. 216, holding that gain derived from the sale of municipal bonds not issued at a discount may properly be subjected to Federal income tax, where the Court by Chief Justice Hughes said, at page 227:

> "The sale of the bonds by their owners, after they have been issued by the state or municipality, is a transaction distinct from the contracts made by the government in the bonds themselves, and the profits on such sales are in a different category of income from that of the interest payable on the bonds."

Further, as a matter of legal theory and as the learned Circuit Judge who spoke for the minority pointed out (R. 505) there is another analogy in the "sharp distinction made in the law between the law which governs the nature of a contract, including its assignability, and the law which is looked to to determine whether a given transaction assigns the contractual rights."

Finally, wholly apart from legal theory and settled principles of law, there is a great practical difference in the necessity for applying a single federal rule to cases involving the rights and obligations of the Government and to cases where the rights and obligations of the Government are not in issue. There is much to be said for the desirability, if not the necessity, of relieving those engaged in the day-to-day operations of the Gov-

ernment from being obliged to refer to the laws of the several states. Government attorneys are directly concerned, however, only with whether or not the rights of the United States as a borrower and as a party liable on the bonds are protected. On the other hand, it is the private lawyer in Pennsylvania or California who is directly concerned when the question involves the rights of clients acquiring or disposing of bonds. The language of Judge Lumbard in *Reconstruction Finance Corporation v. United Distillers Products Corp.*, 229 F. 2d 665, 667 (C.C.A. 2d, 1956) is pertinent:

> "* * * The principle to be applied here is not one which will affect the day to day dealings of the R.F.C., the contracts it makes, or the instruments which it executes. On the other hand, the validity of a conveyance of a real property is a matter peculiarly within the area necessarily governed by state law. We think this is a situation in which the state law furnishes 'convenient solutions in no way inconsistent with adequate protection of the federal interest.' "

(e) *The remoteness of any interest of the United States.* The decision of the Court of Appeals is predicated upon three assumptions, viz.: (i) that the United States has an interest (undefined) in the outcome of litigation between holders of Government bonds; (ii) that in order to protect this interest, there must be uniformity in the determination of the rights of owners as against transferees of such bonds; and (iii) that such uniformity will be attained if these rights are determined by federal decisional law rather than state stat-

utory law. It is submitted that all three assumptions are unsound, and that the decision introduces uncertainty and confusion which may actually work against the interest of the United States.

If the United States has in fact any substantial interest in the outcome of litigation between private parties who deal in its bonds, the proper and effective way to achieve uniformity of result would be to state the rule deemed proper in a statute or appropriate regulation. This has not been done. The only statute[1] relating to the bonds authorizes their issue and is completely silent as to the rights of owners and transferees, except that it is provided that the bonds are to be free of certain taxes. The United States Treasury Department Regulations[2] are equally silent so far as the rights of owners and transferees are concerned. These regulations set forth in considerable detail the procedures followed by the Treasury Department in making payments on the public debt and are very careful to point out that the Treasury Department cannot undertake to protect owners of lost or stolen coupon bonds or notes. They do not purport to touch upon the rights of owners and transferees as among themselves.

The Court of Appeals has not shown in any way how the United States would benefit by having applicable to United States bonds a rule as to the rights of transferees which is contrary to the rule applicable in most of the states of the Union with respect to the rights of transferees of other bonds. The absence of any pro-

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(1) Home Owners' Loan Act of 1933, 48 Stat. 128 (1933), 12 U.S.C. §§1461 et seq.

(2) Title 31, Code of Federal Regulations, Chapter II, Part 306.

vision in the statute authorizing the issuance of the bonds and in Treasury Department regulations suggests rather strongly that the rights of owners and transferees as among themselves are of no vital concern to the United States. This is not surprising. We find it difficult to believe that the salability of Government securities will be substantially affected one way or another by the determination of disputes among owners and transferees. Assuming, however, that the United States does have some interest in such disputes, we submit that investors are more likely to be deterred from investing in, than encouraged to invest in, Government bonds by rules of law which make it easier for a thief to dispose of a Government bond than bonds of private corporations. The United States is concerned with the interest and attitude of the first purchaser of Government bonds. No interest of the United States can be promoted by encouraging and protecting those who take stolen Government bonds.

The third assumption, that a better uniformity of result will be achieved by applying federal decisional law rather than a uniform law adopted in all forty-eight states and the District of Columbia, is also unsound. Uniformity of law by the decisional process is slow and costly. It is also illusory, unless this Court can be expected to have opportunities for, and to devote its time to, the development of a law of negotiable instruments separate and apart from that contained in the Negotiable Instruments Law. Uniformity by the application of federal decisional law is predicated on the hypothesis that the right of review by this Court provides a full and complete mechanism for reconciling conflicting opinions. The pressure of business on this Court under-

standably makes review here the exception rather than the rule and, as Judge Augustus Hand pointed out in *Cole v. Pennsylvania R. Co.*, 43 F. 2d 953, 957 (C.C.A. 2d, 1930): "Consequently there is much less chance than formerly of securing or even promoting uniformity through the decisions of the Supreme Court."

An interesting analogy to the case at bar is presented in *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310. The action was on a policy of marine insurance on a houseboat used for commercial carriage of passengers on an artificial lake between Texas and Oklahoma. The insurer defended on the ground of breaches of warranty against use of the boat for commercial purposes without its consent. It was claimed that the policy had been delivered in Texas, under whose statute a breach of warranty could not constitute a defense unless the breach had contributed to bring about the destruction of the property. The District Court made no finding as to whether the policy had been delivered in Texas but held that, since it was a maritime contract, federal admiralty law, and not state law, governed. The Court of Appeals affirmed a judgment for the defendant. This Court reversed the judgment and remanded the cause to the District Court for trial under appropriate state law. Mr. Justice Black, delivering the opinion of the Court, said at page 319:

> "The hearings on the McCarran Act reveal the complexities and difficulties of an attempt to unify insurance law on a nationwide basis, even by Congress. Courts would find such a task far more difficult. Congress in passing laws is not limited to the narrow factual situation of a particular controversy as courts are in deciding lawsuits. And Congress

could replace the presently functioning state regulations of marine insurance by one comprehensive Act. Courts, however, could only do it piecemeal, on a case-by-case basis. Such a creeping approach would result in leaving marine insurance largely unregulated for years to come."

How long, "on a case-by-case basis," would it take the federal courts to fashion a law of negotiable instruments distinct from the states' statutory law?

In considering the soundness of the decision here, one may properly contrast the "attractive vision of a uniform body of federal law"[1] with these very practical considerations: The whole development of the law of negotiable instruments in this country has been dominated in the past fifty years by the provisions of the Negotiable Instruments Law. The Act has been interpreted and applied in literally thousands of decisions by both state and federal courts. There have been some conflicting interpretations, but these are relatively minor as measured by the degree of uniformity which has been achieved. Federal decisional law independent of the statute has been relatively meager, if not altogether lacking, for the past fifty years. It is interesting to note, for example, that the cases principally relied upon by the majority (*Murray v. Lardner,* 2 Wall. 110, and *Morgan v. United States,* 113 U.S. 476) were decided in 1864 and 1885, respectively. The number and variety of transactions taking place daily in Government securities are very large. Whether these transactions consist of pledges, assignments, gifts or other dispositions, the

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(1) *Guaranty Trust Co. v. York, supra,* at page 103.

rights of the parties in all these transactions would, under the decision of the Court of Appeals, be determined by an archaic and largely non-existent federal decisional law and without the benefit of the provisions of the N.I.L. or the judicial experience under it. The primary source of reference for judges and lawyers called upon to decide or to advise with respect to the effect of such transactions has been the Negotiable Instruments Law. If the decision below stands the fact that the Negotiable Instruments Law and the decisions under it may no longer be relied upon will come as a surprise, we think, to most lawyers and courts and do more to create uncertainty than to remove it. "The general state of the law of negotiable instruments of the United States by 1890, when the movement for uniform laws got under way, was one of complete confusion." Beutel's Brannan Negotiable Instruments Law, 72 (7th Ed., 1948).

The imposition of a uniform federal law distinct from the state law would, in the practical application of the law in the courts, result not in uniformity but in complete confusion. Though in the case at bar the action was only for conversion of Government bonds, the defendants in the case had also attempted to collect on stolen bonds of the West Penn Power Company (R. 467-475). If the theory for which the respondents contend had been applied, what would have been the result in the trial of this diversity action if it had been based on the theft of the West Penn Power bonds as well as Government bonds? The trial judge would have had to give the jury two sets of instructions, one covering the burden of proof as to the Government bonds, the other covering the burden of proof as to the West Penn Power bonds. Even if the jurors could successfully

have kept the matter straight and rendered a fair verdict under such disparate rules, they would surely have left the courthouse with the opinion that the law was foolish. At such a price, achievement of a "uniform federal rule" comes too dear.

II.

If the Question Here Involved Were to Be Decided Under Federal Law, the Source From Which That Law Should Be Drawn Is the Negotiable Instruments Law.

If it be assumed that the question at issue here is to be decided according to a "federal" law, the decision below is nevertheless wrong in determining the source from which that law is to be drawn. This is well illustrated by this Court's decision in *Funk v. United States,* 290 U.S. 371.

That case involved the question whether the wife of the defendant in a criminal case in a federal court was a competent witness in his behalf. Under the rules then applicable, that question was a matter of "common law." This Court had at least twice, and fairly recently, decided that a wife was not a competent witness. *Hendrix v. United States,* 219 U.S. 79, and *Jin Fuey Moy v. United States,* 254 U.S. 189. On the basis of these decisions, the trial court had excluded the defendant's wife as a witness, and this ruling was affirmed by the Court of Appeals for the Fourth Circuit.

When the case came here, however, the decision was reversed. The Court pointed out that legislation generally had removed the disqualification of the wife to testify in the states. In reaching this result, the Court

referred to *Benson v. United States,* 146 U.S. 325, and *Rosen v. United States,* 245 U.S. 467, in both of which cases it was held that a codefendant was a competent witness. In the *Funk* case, the Court said that the conclusion in the *Rosen* and *Benson* cases "was based not upon any definite act of legislation, but upon the trend of congressional opinion and of legislation (that is to say of legislation generally), and upon the great weight of judicial authority which, since the earlier decisions, had developed in support of a more modern rule. In both cases the court necessarily proceeded upon the theory that the resultant modification which these important considerations had wrought in the rules of the old common law was within the power of the courts to declare and make operative." 290 U.S. at 380. The Court then went on to say that where Congress did not exercise its power, it was the duty of the Court "to decide" the question "in accordance with present day standards of wisdom and justice rather than in accordance with some outworn and antiquated rule of the past." 290 U.S. at 382. The Court then held that because of the widespread statutory change the old rule was now out of date, and a more modern rule should be recognized, namely that a wife is a competent witness. The *Hendrix* and the *Jin Fuey Moy* cases were both expressly overruled.

The applicability of the *Funk* case to the problem involved here is clear. On the question of burden of proof the Court of Appeals relied on a decision of this Court in 1864. Since that time, the Negotiable Instruments Law has been written, and has been adopted by every state in the Union, and by Congress for the Dis-

trict of Columbia.[1] Thus, the old rule exemplified by *Murray v. Lardner,* 2 Wall. 110, if correctly interpreted by the court below, is now completely outdated and should no longer be regarded as stating the rule applicable in the federal courts.[2] The parallel between the two situations seems very close. As a matter of fact, the present situation is much stronger than that involved in the *Funk* case, since the cases overruled in the *Funk* case were much more recent, and since the statutory provisions relied on as changing the common law in the *Funk* case were varied, while here the common law of the country, as between private parties, has been restated by the adoption of the Negotiable Instruments Law.

The Negotiable Instruments Law stands, it has been said, "as the first and greatest work which the Commission on Uniform Laws has produced in its fifty years of fruitful labor to unify the statutory law of the United States. The N.I.L. is more than just another commercial statute. It marks the beginning of an epoch of codification and unification of the entire commercial law of the United States." Beutel's Brannan Negotiable Instruments Law, page 79 (7th Ed., 1948).

There are other cases which support the conclusion that even if the matter is to be governed by "federal"

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(1) The dates of adoption and effective dates are set forth in Beutel's Brannan Negotiable Instruments Law, pages 1353-1354 (7th Ed., 1948).

(2) As we contend under point 3, *infra,* page 37, the correct interpretation of the *Lardner* case is that it does not conflict with §59 of the N.I.L.

law, the source of this law should be found in the Negotiable Instruments Law. Reference may be made to *Burns Mortgage Co. v. Fried,* 292 U.S. 487. That case was a diversity case. It was decided in 1934, while *Swift v. Tyson* was still operative, before the decision in *Erie Railroad Co. v. Tompkins.* The case involved a negotiable instrument. Thus, it raised a question of commercial law, and under *Swift v. Tyson* this question was to be decided in accordance with the "federal common law". The Court, speaking through Mr. Justice Roberts, held that the question should be decided under the Negotiable Instruments Law as interpreted and applied by the Florida court. Thus, for this purpose, the decision of the Court amounted to a decision that the "federal common law" in this field was determined by the state law of Florida embodied in the Florida statute and the decision of the Florida Supreme Court.

Other cases presenting a similar approach include *Mutual Life Insurance Co. v. Johnson,* 293 U.S. 335, 340; *Marine National Exchange Bank v. Kalt-Zimmers Manufacturing Co.,* 293 U.S. 357, 366-367; and *Board of County Commissioners v. United States,* 308 U.S. 343, 351-352.

Our position with respect to the source of federal law on such a matter as that here involved is supported by *New York, N.H. & H. R. Co. v. Reconstruction Finance Corporation,* 180 F. 2d 241 (C.C.A. 2d, 1950). That case arose in connection with the reorganization of the New Haven Railroad under Section 77 of the Bankruptcy Act. The question was whether a renunciation of interest was valid. The Reconstruction Finance Corporation contended that the question must be decided in accordance with "federal common law," and not under

Section 122 of the Negotiable Instruments Law as enacted in New York. With respect to this contention, the court speaking through Judge Learned Hand, said (180 F. 2d at 244):

> "The purpose of the doctrine that the transactions of such corporations are not subject to state law, is that such agencies, being national in their scope and aim, shall not be forced to shape their transactions to conform to the varying laws of the places where they occur, or are to be carried out. Uniformity is thought to be essential to the convenient and speedy dispatch of their operations. However, the Negotiable Instruments Law has been enacted in every state of the Union, as well as in the District of Columbia; it is a source of 'federal law'—however that phrase may be construed—more complete and more certain, than any other which can conceivably be drawn from those sources of 'general law' to which we were accustomed to resort in the days of Swift v. Tyson. So far as it applies to the letter of December 21, 1938, it will therefore determine the rights of the respondent and the liabilities of the present petitioner, for it is New York law as well as 'federal law.'"

See also, to similar effect, *Whitin Machine Works v. United States,* 175 F. 2d 504, 507 (C.C.A. 1st, 1949).

One of the serious consequences of the decision in this case is that the dead hand of decisional law developed almost a century ago is perpetuated and placed beyond the power of the states to alter or change, either by judicial decision or statutory enactment. If Pennsylvania is to be no longer free to legislate with respect

to such matters as the morals of the market place, federal rules established at such an early date should not be accepted without critical appraisal of the soundness of the rules in relation to present day conditions. The words of Mr. Justice Black in the dissenting opinion in *Francis v. Southern Pacific Co.*, 333 U.S. 445, at pages 452-453, are peculiarly appropriate here:

> "* * * The old Adams rule, questionable enough in its 1904 environment, should in my judgment be critically examined and then abandoned as wholly incongruous with the accepted pattern of our modern society as embodied in legislative enactments. * * *
>
> I.
>
> "It should be noted at the outset that tort law has been fashioned largely by judges, too largely according to the ideas of many. But if judges make rules of law, it would seem that they should keep their minds open in order to exercise a continuing and helpful supervision over the manner in which their laws serve the public. Experience might prove that a rule created by judges should never have been created at all, or that their rule, though originally sound, had become wholly unsuited to new physical and social conditions developed by a dynamic society. A revaluation of social and economic interests affected by the old rule might reveal the unwisdom of its expansion or imperatively require its revision or abandonment."

III.

The Defendant-Respondents Had the Burden of Proving Their Asserted Defense of Being Holders in Due Course.

It is clear under Pennsylvania law that when it has been shown that the title of any person who has negotiated an instrument was defective, one claiming the rights of a holder in due course has the burden of proving that he is such a holder and must prove all the necessary elements. This was settled Pennsylvania law prior to the enactment of the Negotiable Instruments Law and is the uniform construction of Section 59 of the statute. *Kuhns v. The Gettysburg National Bank,* 68 Pa. 445 (1871) (which involved a negotiable United States draft); *Robinson v. Hodgson,* 73 Pa. 203 (1873); *Crittenden v. Hoffman,* 279 Pa. 127, 123 Atl. 661 (1924); *Title Guaranty Company v. Barone,* 319 Pa. 499, 181 Atl. 765 (1935); and *First National Bank of Blairstown v. Goldberg,* 340 Pa. 337, 17 A. 2d 377 (1940).

Prior to the enactment of the Negotiable Instruments Law, the cases in a number of the other states, perhaps a majority of them, and in the Federal courts were to the contrary, at least where "burden of proof" is used in the sense of burden of persuasion. The cases were numerous and often apparently conflicting even within the same jurisdiction. The rule under the common law in the Federal courts, and perhaps a majority of the state jurisdictions, was that it was sufficient for the one claiming to be a holder to show that he acquired the instrument before maturity in the regular course of business and paid value therefor. In some of the cases

this was clearly dictum.[1] In other states it was necessary for the holder to go further and prove want of knowledge on his part, or in other words to prove all the elements necessary to constitute him a holder in due course, including the facts that he took in good faith and without notice of any defect or infirmity in the title of the person negotiating the instrument. This conflict has almost disappeared since the enactment of the Negotiable Instruments Law. Except in three or four states, it is now held that when prior defective title has been shown the burden is cast on the one claiming to be a holder to prove all the requirements prescribed by Section 52,[2] including the requirements that the instrument was taken in good faith and that at the time it was negotiated to him that he had no notice of any defect in the title of the person negotiating it. Some of numerous authorities supporting the conflicting views at common law and also the authorities since the enactment of the Act are collected in *First National Bank & Trust Co. of Muskogee v. Heilman,* 62 F. 2d 157 (C.C.A. 10th, 1932).

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(1) *Murray v. Lardner,* 2 Wall. 110, relied upon by the majority in the court below presented only the question of the correctness of a charge to the effect that the jury might find that the defendants had acted in bad faith if they had reason to be suspicious of the title of the person presenting the bonds. This was held to be erroneous and would be erroneous under the express provisions of the Negotiable Instruments Law. This question is not present in the case at bar. The District Judge charged the jury (R. 426) "Good faith is the opposite of bad faith. To charge a defendant with bad faith, it is not enough to show that the defendants took the bonds under circumstances which ought to excite the suspicions of a prudent man and cause him to make inquiry."

(2) Purdon's Pa. Stat. Ann. Tit. 56, § 132 (1930).

See also *Commercial Trust Co. of New Jersey v. Kealey,* 92 F. 2d 397, 402 (C.C.A. 4th, 1937); Beutel's Brannan Negotiable Instruments Law, 876-882 (7th Ed., 1948); and Annotation, "Effect of fraud in the inception of a bill or note to throw upon a subsequent holder the burden of proving that he is a holder in due couse", 18 A.L.R. 18, 39-52; supplemented in 34 A.L.R. 301 and 57 A.L.R. 1083.

The rule which was in effect in Pennsylvania at common law and which, according to the great weight of authority is the rule in effect under the Negotiable Instruments Law, is the preferable one. Its theory and underlying philosophy is well explained in Britton, Bills and Notes, § 104, pages 437-438, as follows:

> "* * * The genuine bona fide purchaser may be counted upon to convince the jury that he is such. But many a pretended bona fide purchaser, the unscrupulous discounter who always stands ready to take the ill-gotten paper obtained by the fraudulent payee, will be caught in his own web by the majority rule, whereas, under the minority rule, many such purchasers will win, not because they are bona fide, but because the defendant will not be able to get the evidence necessary to show that plaintiff's cultivated innocence was but a mask."

Our position on this point is supported by three cases involving United States bonds decided in Courts of Appeals since the enactment of the Negotiable Instruments Law; *Kean v. National City Bank,* 294 Fed. 214, (C.C.A. 6th, 1923), cert. den., 263 U.S. 729; *C. F. Childs & Co. v. Harris Trust & Savings Bank,* 27 F. 2d 633 (C.C.A. 7th, 1928), cert. den., 278 U.S. 653; and *Queenan v. Mays,* 90 F. 2d 525 (C.C.A. 10th, 1937), cert. den., 302

U.S. 724. Each involved the alleged conversion of United States bonds, and in each it was held that the burden of proving the defense of bona fide purchaser rested upon the party asserting the defense.

In the *Kean* case the court, speaking without reference to state law, said (294 Fed. at 226):

> "As an aid in retrial, it remains only to say that in our opinion the defense of bona fide purchaser is an affirmative defense, and the burden of proving it rests with the defendant. Curtis, Collins & Holbrook Co. v. United States, supra; Wright-Blodgett Co. v. United States, 236 U.S. 397."

The *Childs* case and the *Queenan* case refer to state statutory law, and presumably were applying such law rather than any independent federal decisional law. This does not lessen the applicability of these decisions here, however, since United States bonds were involved and the decision of the court below in this case would preclude the use of state statutory law.

IV.

Regardless of Any Question of Choice of Law or Burden of Proof, One Who Acquires a Bond Four and One-half Years After It Has Been Called for Redemption, and With Notice of the Call, Is Precluded From Claiming the Rights of a Holder in Due Course.

The action of the court below was erroneous (1) if as we contend under Point I, the governing law was the law of Pennsylvania, or (2) if, as we contend under Points II and III, the proper rule as to burden of proof is the rule established by the Negotiable Instruments Law. It is believed that the action was erroneous, irrespective of the final conclusion with respect to either of these matters, for the further reason that the transactions in the bonds were at such a time as to preclude the defense of bona fide purchase.

The court below held, on the supposed authority of *Morgan v. United States,* 113 U.S. 476, that the bonds had been taken before maturity and that the defense of good faith purchase was available, both as to the respondent bank, which admittedly knew that the bonds had been called four and one-half years before being taken by the bank, and as to Parnell, where the testimony is not clear[1].

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(1) Mr. Parnell first denied that he knew that the bonds had been called for redemption but in his Answer to the Complaint he had averred that he took the bonds to the bank for redemption and his final answer to the question as to whether or not he knew that the bonds had been called was "No, I can't say that I did." (R. 312-313). It is submitted that he had the burden of showing affirmatively that he took prior to maturity.

We think the *Morgan* case is not controlling here and is readily distinguishable on two grounds, viz.: (1) Congress had indicated that the bonds there involved were to continue to be negotiable, and (2) the bonds there involved were taken some three months after they had been called and here the bonds were taken four and one-half years after the call. The facts in the *Morgan* case were these. The bonds were Treasury Bonds redeemable any time after July 1, 1870, and payable July 1, 1885. Congress had authorized the refunding of these bonds by the issuance of new bonds to be sold for cash or issued in exchange for the bonds in suit. A banking syndicate had entered into a contract with the Government under the terms of which it was to purchase the new bonds and was to be permitted to make payment in the bonds which had been called for redemption.

This Court gave several reasons for its conclusion that the bonds continued negotiable, but the opinion makes it crystal clear that the principal ground was that Congress had indicated an intention that the old bonds were to continue negotiable after the call, by authorizing them to be accepted in exchange for the new bonds and by entering into a contract with the banking syndicate agreeing that the new bonds could be issued or exchanged for the old bonds. This is a perfectly understandable conclusion, and if the case is limited to its peculiar facts, it does no violence to well settled principles of law.

Passing this question, however, and proceeding to the other great factual difference in the cases, the bonds here involved were negotiated four and one-half years after the call, and had eight uncashed coupons attached to them, covering interest for four years; and they were

handled and presented for redemption, which itself shows that the parties dealing with them knew that their face amount was now due, that is, that their maturity had been accelerated several years in the past. In the *Morgan* case the transaction was only three and one-half months subsequent to the call. Bonds which have been called are the equivalent of demand paper. Demand paper is not overdue until the lapse of a reasonable time, and while three and one-half months may not be an unreasonable time for demand paper to remain in circulation, four and one-half years would certainly seem too long. Judge Goodrich has pointed out in a footnote (R. 508-509; 226 F. 2d 305) that the modern commercial view upon the precise question here involved is expressed in Section 8-305 of the Uniform Commercial Code (Purdon's Pa. Stat. Ann. Tit. 12a, §8-305 (1954)). This section provides in substance that a call for redemption constitutes notice of claims of ownership after one year from the date set for presentment for redemption, or if funds are available for payment after six months from the date set for payment.

The language in the *Morgan* case upon which the majority relies, as Judge Goodrich has pointed out (R. 507; 226 F. 2d 304-305), also seems in conflict with the position taken by Mr. Justice Cardozo in *Smyth v. United States,* 302 U.S. 329, 353, where it is stated that redemption clauses in Government bonds "are provisions for the acceleration of maturity at the pleasure of the Government, and upon publication of the notice for the period stated in the bonds the new date became substituted for the old one as if there from the beginning."

It need not be decided in this case whether or not one who takes a negotiable instrument after the ac-

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ut before the fixed, maturity, without knowl-
accelerated maturity, may claim the defense
in due course. Whatever the proper rule may
ases, we think it clear that one who takes a
fter, and with knowledge of, the accelerated
ould be treated as taking too late. As has
ted, this is the view adopted by the Uniform
Code, which represents the long and careful
many experienced in the field. It has been
f all the others who have considered the
e question is dealt with at considerable length
or Ralph W. Aigler in his "Cases on the Law
Notes" (2nd Ed., West Publishing Company,
points out, at page 344 of that book, that in
ases, and prior to the Negotiable Instruments
g after maturity was treated as a matter of
cting the bona fides of the purchaser. In sup-
s proposition the author quotes the following
r v. Leland, 4 Cush. (Mass.) 456 (1859):

> But where a negotiable note is found in cir-
> cu on after it is due, it carries suspicion on the
> fa f it. The question instantly arises, Why is it
> in culation,—why is it not paid? here is some-
> th wrong. Therefore, although it does not give
> th dorsee notice of any specific matter of defence,
> su as set-off, payment, or fraudulent acquisition,
> yet puts him on inquiry; he takes only such title
> as indorser himself has, and subject to any de-
> fen which would be made, if the suit were brought
> by e indorser."

Coming irectly to the situation where the instrument
is payal at a fixed time but with a provision for ac-

celerated maturity, Professor Aigler states, at pages 347-348:

> "An interesting question arises in connection with instruments payable at a fixed or determinable time, but with a provision for accelerated maturity. Clearly if one purchases such paper after the fixed maturity, he takes too late to be a holder in due course in his own right. *If the maturity has been accelerated and he knows that has happened, then equally clearly he takes too late.* The difficulty arises when a purchase is made after the accelerated maturity but before the fixed maturity and the purchaser has no notice of the acceleration." (Emphasis supplied.)

The same view is taken in Britton, Bills and Notes, Section 121, page 506, where it is said:

> "Where the option to mature has been exercised and the purchaser, before the arrival of the fixed maturity, has knowledge of such fact, clearly he is not a purchaser before maturity. Section 52 (2), by necessary analogy, so provides."

It is submitted that the law as stated by Aigler and Britton is correct and that the *Morgan* case is not to be read as establishing any contrary rule.

If we are correct as to this matter, no defense was available to the defendant-respondents, and the judgments of the District Court should have been affirmed on this ground alone, without passing upon the matter of the governing law or the proper rule with respect to the burden of proof.

CONCLUSION

The question as to whether a defendant has in Pennsylvania converted bonds of an instrumentality of the United States should be determined under the law of Pennsylvania and not under a "federal" law which is to be fashioned in a vain pursuit of uniformity. If, however, a federal rule were to be sought, it should come from the Negotiable Instruments Law, enacted in all the states and in the District of Columbia, rather than from outmoded court decisions of an earlier century. Even if federal decisional law were to be applied in the case at bar, the result should be the same as under the Uniform Negotiable Instruments Law. In any event, in the case at bar, where the bonds involved were acquired, with eight past due coupons attached, four and a half years after they were called for redemption and with notice of the call, we submit that they were not held by the respondents in due course.

It is therefore respectfully submitted that the judgments of the Court of Appeals should be reversed and the judgments of the District Court should be affirmed.

Respectfully submitted,

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August 1956

APPENDIX A.

28 U.S.C. § 1

The law

I.

Constitution C. § 1652. State laws as rules of decision.

Congress oth e laws of the several states, except where the as rules of ution or treaties of the United States or Acts of United State s otherwise require or provide, shall be regarded c. 646, 62 Sta of decision in civil actions in the courts of the States, in cases where they apply. June 25, 1948, 2 Stat. 944.

Section 59 Law, Act of Ann. Tit. 56

II.

59 of the Pennsylvania Negotiable Instruments t of May 16, 1901, P. L. 194, Purdon's Pa. Stat. t. 56, §139 (1930).

§139. E

Every 9. Burden of proof when title is defective.

in due cour ery holder is deemed prima facie, to be a holder person who ourse; but when it is shown that the title of any the burden who has negotiated the instrument was defective, person und den is on the holder to prove that he or some in due cou nder whom he claims acquired the title as holder apply in f ourse. But the last mentioned rule does not instrument favor of a party who became bound on the title. (190 nt prior to the acquisition of such defective 1901, May 16, P. L. 194, ch. I, art. IV. §59.)

FILED
OCT 4 1956
JOHN T. FEY, Clerk

No. 21

In the Supreme Court of the United States

OCTOBER TERM, 1956

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, PETITIONER

v.

GILBERT PARNELL, RESPONDENT

On Writs of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENT

EDWARD DUMBAULD,
52 East Main Street,
Uniontown, Pennsylvania
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No. 21

In the SupSupreme Court of the United States

OCTOBER TERM, 1956

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, PETITIONER

v.

GILBERT PARNELL, RESPONDENT

On W On Writs of Certiorari to the United States Court of Appeals for the Third Circuit

OPINIONS BELOW

The (R. 44 of App

The memorandum opinion of the District Court (R. 445) is unreported. The opinion of the Court of Appeals (R. 496) is reported at 226 F. 2d 297.

JURISDICTION

The tered o certiora granted diction 1254 (1 fore or materia ment of new tria locutory

The judgment of the Court of Appeals was entered on October 14, 1955 (R. 518). Petition for certiorari was filed December 20, 1955 and was granted February 27, 1956 (R. 519). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1). As this section authorizes review "before or after rendition of judgment" it is immaterial that as to respondent Parnell the judgment of the Court of Appeals, directing that a new trial be granted, might be regarded as interlocutory.

QUESTIONS PRESENTED

1. Does federal law (under *"Clearfield"* principles, rather than State law under *"Erie"* doctrine) govern the process of transmitting government bonds through the Federal Reserve System for collection and redemption?

2. Can parties who serve only as "conduits" or intermediaries in the collection process and who act in strict accordance with Treasury Regulations be held liable, in the absence of proof of bad faith or actual notice of any irregularity, for conversion of bearer bonds handled by them?

3. Does the fact that inoperative coupons are attached to a government bearer bond which is redeemable but not yet due and payable require that the preceding question be answered any differently?

STATUTES INVOLVED

Pertinent provisions of the Home Owners' Loan Act of June 13, 1933, 48 Stat. 129 as amended by the Act of April 27, 1934, 48 Stat. 643 (12 U. S. C. A. 1463(c)) and of applicable Treasury Regulations are set forth in the Appendix hereto, p. 60 *infra*.

STATEMENT

Petitioner, a national banking association having its principal place of business in San Fran-

cisco, brought suit in the United States District Court for the Western District of Pennsylvania against four defendants, alleging that each of them converted to his or its own use two batches of Home Owners' Loan Corporation 3% Series A bearer bonds (R. 12-15, 28).

The Home Owners' Loan Corporation is an instrumentality of the Federal Government, and the bonds, as required by law, stated on their face that they were fully and unconditionally guaranteed both as to interest and principal by the United States.

The bonds were bearer bonds, as stated on their face. The interest coupons were also payable to bearer, as a separately stated obligation.

Principal and interest were made payable "at the Treasury Department, Washington, D. C., or at any government agency or agencies in the United States which the Secretary of the Treasury may from time to time designate for the purpose."

The bonds were stated to be "payable May 1, 1952." However, they were redeemable upon call on any interest date on or after May 1, 1944, and interest thereafter was to be discontinued, whether or not the bond and accompanying coupons were surrendered. The bonds were tax exempt. (R. 449-452).

pondent Gilbert S. Parnell is senior partR a country law firm engaged in general pracner t Indiana, Pennsylvania (R. 301-2). The tice of one Arthur Rocco had been clients of fam m for a long time, and in September of 1948 the consulted Parnell regarding establishment Ro istributorship for the then much publicized of r automobile. For this venture, as well as Tu oal stripping operations, Rocco stated that he hed to turn some bonds into cash, and reso d Parnell to handle the transaction at the he National Bank in Indiana, of which Parnell qu director (R. 303-4).

Fi September 28, 1948, Parnell took to the wa the first batch of Home Owners' Loan Cor- on bonds involved in this suit, amounting Ba 600.00. On the same day the Bank forpo l the bonds by registered mail to the Pittsto Branch of the Federal Reserve Bank of wa nd. The Federal Reserve Bank of Clevebu hich was a fiscal agent of the United States Cl purpose of paying such bonds, credited la ount to the First National Bank of Info ith Treasury regulations. On October 1, th he First National Bank of Indiana issued di nell a cashier's check for the amount colar (less $10.00 expenses). Parnell cashed the 19 nd turned the money over to Rocco.* (R. to-

le the proceeds of the three batches of bonds Parnell was l fees, amounting to $650 as he recalls. (R. 317). Acb Rocco it was a larger amount. (R. 491-92).

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cc

16-21, 158-64, 297, 304-7, 314-16, 340-41). The money received by Parnell was in bills of $100.00 and smaller; the Bank did not carry any larger bills on hand. (R. 344).

On October 25, 1948, the second batch of Home Owners' Loan Corporation bonds, amounting to $38,000.00, was similarly received by Parnell from Rocco, turned over to the First National Bank in Indiana for collection, forwarded by it to the Federal Reserve Bank of Cleveland for redemption, and the proceeds credited to the First National Bank in Indiana, which on October 28, 1948, issued its check to Parnell (deducting $20.00 expenses), and Parnell cashed the check and turned over currency in small denominations to his client (R. 17-18, 22-24, 165-68, 317-19, 341).

Earlier in September there had been another similar transaction, dealing with securities not involved in this case ($20,000 West Penn Power bonds and $5,000 Treasury bonds). Some time after the transactions involved in this suit, the First National Bank in Indiana first got word of any irregularities in connection with bonds received from Parnell to be collected for Rocco. That notice related to the Treasury and West Penn Power bonds not involved in this case. The bank notified Parnell. (R. 308, 345, 348, 353, 485-

87).* This investigation led to indictment of Rocco on March 25, 1949, and his subsequent conviction on December 5, 1950, for interstate transportation of stolen property. Subsequently, on January 26, 1951, the Bank in Indiana received notice from petitioner's counsel regarding the Home Owners' Loan Corporation bonds involved in the present suit (R. 324, 370).

At the time the transactions occurred, neither the First National Bank in Indiana (R. 324, 341-42) nor Parnell (R. 307-8) had notice of any irregularities with respect to any bonds received from Rocco. The Bank did know that the Home Owners' Loan bonds had been called for redemption (R. 355). Parnell did not (R. 312-13).

Considerable testimony was adduced at the trial regarding the circumstances under which the Home Owners' Loan bonds involved in this case disappeared under mysterious circumstances from

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* According to Parnell's recollection, and that of the cashier of the Bank, the discussions of the matter with Parnell at the Bank took place in January or February of 1949. (R. 308, 353, 485). However, the date may have been somewhat earlier. Myers, an F. B. I. agent, testified that on November 5, 1948, he called on Parnell regarding the $5000 of Treasury bonds (R. 372, 375). Parnell could not remember the date of the agent's visit (R. 487). The cashier testified that the Bank's first knowledge came through the F. B. I. and that the first call was not regarding the Home Owners' Loan bonds involved here (R. 345-46). Agent Myers said that he first called at the Bank regarding the Home Owners' Loan bonds on January 14, 1949 (R. 381). In any event, the notice was received after the completion of the transactions involved in this case.

petitioner's banking house in San Francisco on May 2, 1944, while an employee was preparing them to be forwarded to the Federal Reserve Bank for redemption (R. 59-62, 32-91). As proof of the widespread "hue and cry" raised by petitioner following this loss,* evidence was received of notice sent to the Federal Reserve Bank of Cleveland (R. 100-104) and of the fact that the Pittsburgh office of the F. B. I. advised the Los Angeles office on May 22, 1944, that a circular had been mailed to all banks and brokers in the Pittsburgh district. There was "no specific evidence in the file relating to the mailing to the First National Bank in Indiana, Pennsylvania." (R. 241). This circular was not admitted against Parnell (R. 244-49).

Petitioner's complaint was filed February 15, 1951, against four defendants: Rocco, Parnell, First National Bank in Indiana, and the Federal Reserve Bank of Cleveland. The trial court dismissed the Federal Reserve Bank (R. 413). Rocco did not appeal. The Court of Appeals, reversing the District Court, directed that judgment be entered for the First National Bank in Indiana (R. 517) and that a new trial be granted Parnell (R. 518).

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* These documents were not offered as proof of actual notice to any of the defendants, except possibly the addressee, the Federal Reserve Bank of Cleveland (R. 104, 144). They were not offered as against Parnell (R. 138). However, Exhibit 12 was admitted generally (R. 136, 142, 148). See also R. 94, 97.

SUMMARY OF ARGUMENT

I

The process of transmitting government bearer bonds for redemption through the Federal Reserve System in accordance with Treasury Regulations is a federal subject matter governed by federal law. *Clearfield Trust Co.* v. *U. S.*, 318 U. S. 363 (1943), exemplifies the principle applicable here, rather than the rule of *Erie R. R. Co.* v. *Tompkins*, 302 U. S. 64 (1938), calling for application of State law.

The principle of federal law to govern federal subject matter where uniformity is desirable is recognized in many fields, in addition to the situation in *Clearfield* where the United States was suing on its own commercial paper. *Clearfield* is not an unusual or undesirable phenomenon which should be restricted to its particular facts and limited to situations where the Government is a party litigant.

To say that the doctrine of federal law for federal subject matter is merely a device to give the Government an advantage over private parties in lawsuits is to malign the important function of this Court as balance wheel in our dual system of government. Sometimes application of federal law is advantageous to the Government, sometimes it is not. In any event that factor is not

the reason which impels this Court to apply federal rather than State law.

The controlling considerations of public interest with respect to this issue are similar to the familiar problem of determining whether uniformity is desirable in the regulation of interstate commerce. *Southern Pacific* v. *Arizona,* 325 U. S. 761, 767 (1945).

Petitioner's claim that a tort action for conversion is a State-created proceeding necessarily governed by State law is disproved by consideration of *Francis* v. *Southern Pacific Co.,* 333 U. S. 445 (1948), and, indeed, by principles well-known since *Gibbons* v. *Ogden,* 9 Wheat. 1 (1824).

Illustrations of various fields where the principle of federal law for federal subject matter as to which uniformity is desirable is applied include railway labor legislation, interstate commerce, bankruptcy, procurement contracts, public lands, Indian affairs, banking, utilization of interstate streams, and the status of soldiers. A particularly enlightening discussion of the subject is found in *U. S.* v. *Standard Oil Co.,* 332 U. S. 301 (1947). Other leading cases are *D'Oench, Duhme & Co.* v. *F. D. I. C.,* 315 U. S. 447 (1942); and *Deitrick* v. *Greaney,* 309 U. S. 190 (1940). The coexistence of federal law with *Erie* doctrine is shown by the fact that *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.,* 308 U. S. 92

(1938), applying federal law to problems arising from apportionment of water in an interstate stream, was decided on the same day as *Erie* and the opinion was likewise by Mr. Justice Brandeis.

Application of federal law in the case at bar is necessary for protection of the Government's discretionary power to fashion the public debt structure. It is also vital to the interest of the financial community.

The distinctive features of government bearer bonds would be obliterated if States could regulate transfer of such securities, or if recourse to State law were needful to appraise the validity of such transfers. A record of the route traveled by each bond, and of the date and place of each transaction affecting title to it, would be necessary for the safety of parties dealing with the bond. This would transform the nature of the instruments themselves. Instead of being freely negotiable bearer bonds the Government would in practice be confined to issuance of securities having the characteristics of registered or non-transferable bonds. This would encroach upon the Government's freedom of choice in shaping the public debt structure.

Moreover, since the value of bonds to the original purchaser is dependent upon their free negotiability and the ability of subsequent parties to engage safely in dealings with respect to such

bonds, the value of bonds to the first purchaser and hence their salability by the Government would be materially affected. The advantages of government bearer bonds as a safe and convenient medium of investment for liquid capital, with a flexibility practically equivalent to cash, would also be destroyed.

Vital public interests, both of the financial community and of the Government, require application of federal law to the subject matter involved in the case at bar.

The Congress, and the Secretary of the Treasury through regulations having the force of law, have determined that these bonds should be issued in bearer form and that they should be transferable by delivery. The legal consequence of such determination is not merely that the bonds may be discharged by payment to the person presenting them (indeed that subject is separately covered elsewhere in the Regulations) but also that in transactions in the market place between other parties *inter sese* the bonds may safely be dealt with as bearer securities which can be transferred freely like currency or negotiable instruments; and hence that a "conduit" bank serving as intermediary in the collection process is relieved of liability for conversion.

II

A bank acting as a mere "conduit" or intermediary in the process of transmitting govern-

ment bearer bonds, in strict accord with Treasury Regulations, through the channels of the Federal Reserve System for redemption, is not liable, in the absence of proof of bad faith, for conversion of the bonds handled.

Such a "conduit" bank is not required to prove that it is a "holder in due course." That concept would require proof that the bank took for value; and a "conduit" bank never gives value in the sense of investing its own funds in purchase of bonds handled.

It would be utterly irrational and impracticable to hold a bank which merely forwards bonds for redemption and disburses the proceeds collected to a higher standard of care and diligence than is required of a bank purchasing such bonds for investment. Reason and logic dictate that the investor should be held to a stricter standard than the mere instrumentality of commercial intercourse, if there is to be a distinction. A contrary rule would paralyze banking operations. A "conduit" bank is entitled to protection *a fortiori* in a situation where a purchasing bank would be relieved of liability for conversion of government bearer bonds.

The leading case in this Court is *Murray* v. *Lardner*, 2 Wall. 110 (1864). This case has been followed and cited as late as 1935. Important State courts have also accorded protection to

"conduit" parties who act in good faith. *Pratt* v. *Higginson,* 230 Mass. 256 (1918); *Gruntal* v. *U. S. F. & G. Co.,* 254 N. Y. 468 (1930); *First National Bank* v. *Goldberg,* 340 Pa. 337 (1941); Restatement, Agency, sec. 349, Torts, sec. 233.

III

Government bonds, redeemable but not yet due and payable, are not overdue paper. *Morgan* v. *U. S.,* 113 U. S. 476 (1885). Such bonds do not become *functus officio* or dishonored upon call; they merely cease to bear interest. A holder may well choose to retain his bond "as a continuing security for the value it always represents, having impressed upon it by the law of its creation the faculty of passing from hand to hand as money, and therefore just as useful in the pursuits of trade and the exchanges of commerce as so much money in the form of coin or bank notes, and more convenient because more portable." *Smyth* v. *U. S.,* 302 U. S. 329, 357 (1937), does not dilute, but confirms this holding.

Nor does the presence of inoperative interest coupons constitute constructive notice of any infirmity with respect to the principal of the bonds. The interest coupons are independent bearer obligations, separate from the bond to which they are attached. Even if the coupons were overdue (instead of being, as here, merely inoperative, by reason of the call), there would be no imputation

of notice of default or infirmity with respect to the principal of the bonds. *Ry. Co.* v. *Sprague*, 103 U. S. 756, 760-61 (1880); *County of Presidio* v. *Noel-Young Bond & Stock Co.*, 212 U. S. 58, 74-75 (1909).

The presence of inoperative coupons and the fact that the bonds were called was no proof of bad faith in the case at bar, either with respect to the First National Bank in Indiana, which had knowledge of the call, or with respect to Parnell, who did not.

These circumstances would not diminish the protection to which respondents would be entitled if the Court accepts the contentions in Points I and II *supra* with regard to the applicability of federal law and the non-liability of "conduit" parties for conversion of government bearer bonds handled.

ARGUMENT

I

Federal Law governs the process of transmitting Government Bonds through the Federal Reserve System for collection and redemption.

The main issue in this case is whether a bank or other party, acting merely as a "conduit"* or intermediary in the collection process when government** bonds payable to bearer are forwarded through the Federal Reserve System in accordance with Treasury Regulations for redemption, can be held liable for conversion of the bonds handled.

As the Court of Appeals pointed out (R. 497, 226 F. 2d at 299), the trial court considered the case at bar as "an ordinary, garden variety, diversity of citizenship case."

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* This expressive word is used in *Gruntal* v. *U. S. F. & G. Co.*, 254 N. Y. 468, 474 (1930) to describe parties in the position of respondents here.

** For brevity the Home Owners' Loan Corporation bonds involved in this case are called government bonds in this brief. They are "fully and unconditionally guaranteed both as to interest and principal by the United States." The primary obligor is "an instrumentality of the United States," created under an Act of Congress. All its stock is owned by the United States. "All redemptions, purchases, and sales by the Secretary of the Treasury of the bonds of the Corporation shall be treated as public-debt transactions of the United States." 12 U. S. C. A. 1463. Treasury Regulations and practice so treat them.

The trial judge* accordingly applied State law under the doctrine of *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64 (1938), and held that under the Negotiable Instruments Law of Pennsylvania the "conduit" bank had the burden of proving that it was a "holder in due course" of the bonds.** We contend, on the other hand, (and the Court of Appeals agrees), that this is a case in which the *Erie* rule must give way to the doctrine of federal law for federal subject-matter which was exemplified in *Clearfield Trust Co.* v. *U. S.*, 318 U. S. 363 (1943).

The *Clearfield* case, as the Court of Appeals well says, compels the conclusion that

> where United States bonds are concerned, we must look to federal law to determine not only the nature of the obligations, rights, and duties of the United States as a party, but also the rights and duties of holders and transferees of such bonds among each other. (R. 497, 226 F. 2d at 299).

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* Who took office on July 24, 1953 (204 F. 2d ix) and was assigned to this case on September 25, 1953 (R. 5).

** This would necessitate proving that it took for value. Since at the time of receiving the bond a "conduit" bank pays out nothing, and after it collects the proceeds it merely disburses the proceeds it has collected, it never gives value in the sense of investing its own funds in purchase of the bond. The entire concept of "holder in due course" is thus altogether inapplicable, in logic and reason, to the position of a "conduit" bank. The "federal rule" which will be discussed in Point II *infra* recognizes this. To treat the concept of "holder in due course" as controlling, as the dissent of Justice Goodrich would do, (R. 510-12, 226 F. 2d at 306-7) is simply to engage in a series of inapposite verbal manipulations.

The type of government obligation involved in the *Clearfield* case was not a bearer bond, but a check issued by the proper government official to pay a WPA worker. The check was cashed by an unauthorized person under a forged endorsement at a Penney store in connection with a sale of merchandise. The check was paid by the government upon presentation by a bank which guaranteed prior endorsements. The payee discovered and reported the forgery on November 30, 1936. No notice was given to the bank until January 12, 1937. When suit was brought by the government to obtain reimbursement under the bank's guarantee of all prior endorsements, the trial court dismissed the action on the basis of a rule of State law in Pennsylvania relieving the innocent endorser if the drawee fails to give immediate notice upon discovery of the forgery. This ruling was reversed. This Court held that State law did not apply to the subject matter under consideration. The Court said:

> The rights and duties of the United States on commercial paper which it issues are governed by federal rather than local law. When the United States disburses its funds or pays its debts, it is exercising a constitutional function or power. . . . The issuance of commercial paper by the United States is on a vast scale and transactions in that paper from issuance to payment will commonly occur in several states. The appli-

> cation of state law, even without the conflict of laws rules of the forum, would subject the rights and duties of the United States to exceptional uncertainty. It would lead to great diversity in results by making identical transactions subject to the vagaries of the laws of the several states. The desirability of a uniform rule is plain. (pp. 366-67).

While the facts involved in the *Clearfield* case related to the Government's rights on its own commercial paper, there is no warrant for limiting the applicability of the principle it exemplifies to cases where the United States is a party to the litigation. It should be noted that the Court emphasized "the desirability of a uniform rule." That is the basic criterion. The Court also pointed out that transactions in Government paper "*from issuance to payment* will commonly occur in several states" and that the application of State law to such transactions would lead to great diversity in results "by making identical transactions subject to the vagaries of the laws of the several States."

In the case of government bonds of the type involved here, similar transactions "*from issue to payment*" will likewise commonly occur in several States and would be subjected to the vagaries of State law unless "the desirability of a uniform rule" is recognized. Federal law should be ap-

plied to the transactions *"from issue to payment"* in which intermediate parties dealing with the bonds *inter sese* engage, even if the United States is not a party to the suit.

If the concept of federal law is applied to the *Clearfield* situation, it should *a fortiori* be applied to the situation involved in the case at bar. For the Government's power to become a party to commercial paper is not inherent but is purely the creature of statute. *The Floyd Acceptances,* 7 Wall. 666 (1868). But the power to borrow money is not only specifically embodied in the Constitution (Art. I, sec. 8, par. 2; Art. VI, par. 1), but was exercised, before adoption of that instrument, by the Continental Congress during the Revolutionary War. Our national independence is rooted upon exercise of the borrowing power. Alexander Hamilton's fame as a statesman rests upon his federal policy with respect to the public debt. His parting of the ways with James Madison was due to disagreement over the rights to be accorded as a matter of federal policy to *transferees* of the obligations evidencing public debt (in other words, the very subject matter which petitioner here contends is of no concern to the Government, because it involves only transactions affecting the rights of private parties *inter sese).* James Brant, *James Madison,* III, 290-95 (1950). It is unnecessary to say how important it is in the present era of "deficit financing" to maintain unimpaired the federal Government's complete

authority with respect to policy concerning types of securities to be issued and indeed every aspect of management of the public debt.

It would be wrong to suppose that since *Erie* the prevailing philosophy is that there is and should be no such thing as a federal common law, and that a decision such as *Clearfield* which recognizes the applicability of such a federal law is an exceptional and undesirable phenomenon, which should be curtailed and restricted in its application so far as possible, and that therefore *Clearfield* should be confined to its particular facts, and not extended to any situation where the Government itself is not a litigant.

On the contrary, examination of the cases discloses that in many fields involving federal subject matter where uniformity is desirable, federal law is applied. *Erie* did not stigmatize federal law as *filius nullius*. It is a legitimate and normal feature of the federal judicial process in numerous and diversified spheres of application.

National Metropolitan Bank v. *U. S.*, 323 U. S. 454, 456 (1945), differs from the *Clearfield* case in that the government checks there involved were procured to be issued by the fraud of a government employee through the use of forged travel vouchers. He added forged endorsements of the payees and his own endorsement, and cashed the checks at a bank. That bank guaranteed all prior

endorsements and forwarded the checks to the National Metropolitan Bank, which made a similar endorsement, as required by Treasury regulations, in order to obtain payment from the government. In this case the *Clearfield* rule was followed, and the Court held that legal questions involved in controversies over government commercial paper are to be solved by application of federal rather than State law.

Petitioner contends that the United States has no substantial interest in the outcome of litigation between private parties who deal in its bonds, and that the *Clearfield* rule should be limited to cases involving the legal consequences to be attributed to transactions in which the Government itself is a party. Since the application of State law in the *Clearfield* case would have made the legal rights of the United States dependent on the will of the States, petitioner says, a situation objectionable under our dual system of government would arise if federal law were not applied.

We submit that this is a serious misconception of the basis and scope of the *Clearfield* doctrine. The underlying principle of the *Clearfield* case is that federal law should govern where the subject matter of the litigation is federal in nature. The subject matter, not the identity of the parties to the case, is the determinative factor.

To say that this Court sits to spin out a doctrine of federal law merely in order to give the

Government an advantage over private parties in law suits is to malign the important function of this Court as balance wheel in our dual system of government. It may well be that in many cases the effect of applying federal law would be advantageous to the claims of the Government, but in other cases this would not be true.* In any event that factor is not the reason which impels this Court to apply federal rather than State law.

The considerations of public policy which indicate the desirability of uniformity in connection with a federal subject matter are very similar to the considerations which must be weighed by the Court in determining when uniformity is desirable in the familiar field of regulation of interstate commerce. *Southern Pacific Co.* v. *Arizona,* 325 U. S. 761, 767 (1945). In any event the need for uniformity must be shown to be beneficial to the general public interest, and not merely an administrative convenience to employees of the federal government.

Thus in *Davies Warehouse Co.* v. *Bowles,* 321 U. S. 144, 155 (1944), the Price Administrator argued that it would facilitate his administrative task to adopt a nationwide uniform definition of "public utilities," when Congress had provided none. But this Court held that such considera-

* As said in *U. S.* v. *Matthews,* 139 F. Supp. 683, 690 (N. D. Calif. N. D. 1956): "What is sauce for the federal plaintiff as gander ought to be sauce for it when it is the goose."

tions were not controlling, and that where a federal statute simply incorporated a general legal concept, the coverage of the terms used may be determined by State law in the particular case. Thus Congress may incorporate by reference the State law definitions of "real estate" (*R. F. C.* v. *Beaver County,* 328 U. S. 204, 209 (1946)), "children" (*De Sylva* v. *Ballentine,* 351 U. S. 570 (1956)), "heirs" (*Hutchinson Investment Co.* v. *Caldwell,* 152 U. S. 65, 68 (1894)), "next of kin" (*Poff* v. *Penna. R. R. Co.,* 327 U. S. 399, 401 (1946)), and similar terms.

The *Clearfield* case, involving government obligations in the form of commercial paper, is merely one exemplification of the underlying principle that federal law governs a federal subject matter requiring uniformity. The principle has been applied in numerous other fields of law by decisions of this Court.

Thus in the field of railway labor litigation it was held that a right based upon a duty imposed by a federal statute is a federal right, derived from federal legislation and the policy which it embodies. *Steele* v. *L. & N. R. R. Co.,* 323 U. S. 192, 204 (1944).

Another excellent illustration of the underlying principle upon which the *Clearfield* decision is based is afforded by *U. S.* v. *County of Allegheny,*

322 U. S. 177, 182-83 (1944). This Court there said:

> The purpose of the supremacy clause was to avoid the introduction of disparities, confusions and conflicts which would follow if the Government's general authority were subject to local controls. The validity and construction of contracts through which the United States is exercising its constitutional functions, their consequences on the rights and obligations of the parties, the titles or liens which they create or permit, all present questions of federal law not controlled by the law of any state (p. 183).

Bankruptcy law is another field where a uniform federal rule regulates the proof and allowance of claims and the distribution of assets. *Heiser* v. *Woodruff*, 327 U. S. 726, 732 (1946).

Francis v. *Southern Pacific Co.*, 333 U. S. 445 (1948), is another case which illustrates the basic principles applicable to the case at bar. It involved an action against an interstate carrier for wrongful death of a passenger who was traveling on a free pass. Under the State law of Utah there would have been liability. But this Court held that the matter of tort liability for wrongful death was one of the matters governed by federal law, to-wit the provisions of the Interstate Commerce Act regarding the issuance of free passes by interstate carriers, and that there was no room for

the application of the Erie doctrine (p. 449-50).

The *Francis* case completely disposes of petitioner's contention in the case at bar that State law must apply because the action in the case at bar is the ordinary tort action for conversion. The tort action for wrongful death in the *Francis* case was equally a State-created run-of-mine cause of action. But this Court held that the subject matter fell within a field governed by federal law.

In fact the unsoundness of petitioner's contention in this regard has been patent ever since the famous case of *Gibbons* v. *Ogden,* 9 Wheat. 1, 2, 217-21 (1824). The plaintiffs in that case sought to assert a State-created cause of action based upon interference with their ownership of property, namely a monopolistic franchise to operate certain boats in New York waters. But the defendants had a federal license authorizing navigation in those waters, and relied successfully upon the superior authority of their license as a defense. Similarly, in the case at bar, defendants are asserting as a defense to the State-created tort action for conversion a defense based upon federal law.

The object of the *Erie* doctrine is to produce the same decision in a federal court as would be reached in a State court. This purpose is not defeated in cases where federal law is applied because the case involves a federal subject matter. In such a case, the governing federal rule would

be applied even if the case arose in a State court. *K. C. S. Ry. Co.* v. *Van Zant,* 260 U. S. 459, 468 (1923); *Hannum* v. *Amsterdam Casualty Co.,* 330 Pa. 353 (1938); *Pope & Talbot* v. *Hawn,* 346 U. S. 406, 409-11 (1953); *Garrett* v. *Moore-McCormack Co.,* 317 U. S. 239, 245-49 (1942). In the *Clearfield* case, the same decision would have been reached if the suit had been brought in a State court (although as a matter of policy the United States seldom sues in a State court).

Procurement contracts furnish another extensive field for the application of a federally formulated law of contracts. *Priebe & Sons, Inc.* v. *U. S.,* 332 U. S. 407, 411 (1947); *U. S.* v. *Standard Rice Co.,* 323 U. S. 106, 111 (1944); *U. S.* v. *Ansonia Brass and Copper Co.,* 218 U. S. 452, 462 (1910). See also *Royal Indemnity Co.* v. *U. S.,* 313 U. S. 289, 296 (1941).

Public lands and Indian affairs form another important field of subject matter where federal law controls. *U. S.* v. *Fullard-Leo,* 331 U. S. 256, 269-70 (1947);* *Jackson County* v. *U. S.,* 308 U. S. 343, 350 (1939); *Carpenter* v. *Shaw,* 280 U. S. 363, 367 (1930); *Utah Power & Light Co.* v. *U. S.,* 243 U. S. 389, 403-405 (1917).

The federal banking system and insurance of bank deposits furnish a field of federal subject

* It should be noted that in this case the Court cited the *Clearfield* case. Obviously commercial paper is simply one species of a rule embracing various types of federal subject matter.

matter more closely akin to that involved in the case at bar. Here a leading case is *D'Oench, Duhme & Co.* v. *F. D. I. C.*, 315 U. S. 447, 456 (1942). In that case a broker who had sold defaulted bonds to a bank gave the bank a note to be carried rather than the defaulted bonds as an asset of the bank. The bank's receipt for the note stated "This note is given with the understanding that it will not be called for payment." The original note was signed in St. Louis, Mo., and delivered to the bank in Illinois. The evidence did not show where the renewal note was signed, though it was dated at Belleville, Illinois. These transactions occurred prior to passage of the legislation insuring bank deposits. The question was whether the Federal Deposit Insurance Corporation could collect on the notes or whether its rights were subject to the original understanding with the bank that the notes were never to be paid. This Court held that, as a matter of federal law, the legislation of Congress disclosed a federal policy that the F. D. I. C. should be protected against misrepresentations with respect to the status of the assets of insured banks (p. 457-59). The broker was responsible for the creation of the false status, and should be liable for its continuance after the deposit insurance legislation went into effect (p. 461).

Another leading case is *Deitrick* v. *Greaney*, 309 U. S. 190, 200-201 (1940). Here again this Court applied the principle that judicial determination

of the legal consequences which flow from acts regulated by federal legislation is a matter of federal and not State law. There a bank director gave a note to the bank which was substituted for certain stock illegally held by the bank. It was understood that the bank was to continue to own the stock and that the note would never be paid. The Court held that the provisions of the National Bank Act constituted a complete system which could not be defeated by the attempted maneuver: "It is the federal statute which condemns as unlawful respondent's acts. The extent and nature of the legal consequences of this condemnation, though left by the statute to judicial determination, are nevertheless to be derived from it and the federal policy which it has adopted."

A particularly enlightening exposition of the nature of the doctrine calling for application of federal law where a federal subject matter is involved was given in *U. S.* v. *Standard Oil Co.*, 332 U. S. 301 (1947). In that case a soldier had been injured as a result of the negligent operation of a motor vehicle by the defendant. Hospitalization expenses which would have been recoverable from the defendant by a civilian plaintiff were borne by the Government because the soldier's military status entitled him to such hospitalization privileges. The Government attempted to introduce an innovation in tort liability by bringing against the negligent defendant an action analogous to the husband's or father's

remedy for a wrong done to his wife or daughter *per quod servitium amisit.*

This Court declined to recognize the existence of such liability, but before reaching the topic of tort liability *vel non* concluded that that issue presented a question determinable as a matter of federal law and not State law. In that connection, the Court cited the *Clearfield* case, and emphasized that the principle underlying that case was not limited to determination of the rights and duties of the United States on commercial paper which it issues, as petitioner contends in the case at bar. The Court said: "Although the *Clearfield* case applied these principles to a situation involving contractual relations of the Government, they are equally applicable in the facts of this case where the relations affected are non-contractual or tortious in character." (p. 305). Discussing the federal character of the subject matter involved in the relationship between the soldier and his sovereign, the Court said "as the Federal Government has the exclusive power to establish and define the relationship by virtue of its military and other powers, equally clearly it has power in execution of the same functions to protect the relation once formed from harms inflicted by others" (p. 306). The hospitalization expenses also involved the Government's fiscal powers. "Indeed in this aspect, the case is not greatly different from the *Clearfield* case or from one involving the Government's paramount power of

control over its own property, both to prevent its unauthorized use or destruction and to secure indemnity for those injuries." (p. 306). The Court made plain that the *Erie* rule did not have the effect of "broadening State power over matters essentially of federal character" (p. 307).

The Court explained that in this area of federal common law the rules evolved by federal courts (and ultimately by this Court) represent "independent federal judicial decision" outside the constitutional realm. (p. 308). In such cases, whenever the federal courts have occasion to decide a federal question which cannot be answered from federal statutes alone, they must fashion a rule appropriate to give effect to the policy of governing legislation, and to this end may apply the traditional common-law technique of decision and draw upon all the source materials of the common law. *D'Oench, Duhme & Co.* v. *F. D. I. C.*, 315 U. S. 447, 469-72 (1942); *Deitrick* v. *Greaney*, 309 U. S. 190, 201 (1940).

The doctrine of federal law for the governance of federal subject matter, as exemplified in *Clearfield* and other cases discussed in this section of the brief, is not "the ghost of *Swift* v. *Tyson*" as petitioner contends, nor does it postulate "a brooding omnipresence in the sky." It is simply the application of ordinary common law judicial technique to the decision of questions which must ultimately be decided by this Court but which

are not governed by State law or by the specific terms of a federal statute.

Erie simply requires that when a federal court is functioning as a State court under diversity jurisdiction and is applying the common law of a State, it shall derive such law from the applicable State decisions, and not from the federal court's own ratiocinations. When the doctrine of federal law for governance of federal subject matter applies, as in the *Clearfield* case, the federal rule would be followed even if the case arose in a State court, because it springs from and inheres in the nature of the subject matter treated.

That recognition of an appropriate area for the operation of "federal common law" of the type of which we have been speaking is not incompatible with proper respect for the *Erie* doctrine is shown by the fact that *Hinderlider* v. *la Plata River and Cherry Creek Ditch Co.*, 308 U. S. 92, 110 (1938), was decided on the same day as *Erie*, and the opinion was likewise by Mr. Justice Brandeis. The *Hinderlider* case involved apportionment of the water flowing in an interstate stream. This subject matter was recognized by this Court as constituting another appropriate field in which federal law was held determinative, even though the decision involved the sacrifice of private property rights granted by the State law of Colorado.

In the light of the numerous decisions which

have been reviewed where the existence of an appropriate area for application of federal law has been recognized, it is difficult to perceive any justification for petitioner's scruples regarding the constitutionality of such recognition. It is equally impossible for petitioner to derive any comfort from the Conformity Act.* Far from being a "Congressional mandate" which bears upon the problems presented by the case at bar, that time-honored statutory provision simply directs that State law shall be applied where it is applicable. The issue in the case at bar is whether or not State law is applicable under the circumstances here involved, or whether federal law governs (as in *Clearfield* and the other cases discussed above). To cite the Conformity Act is simply question-begging avoidance of the crucial issue in controversy.

The foregoing decisions clearly demonstrate that in divers diversified fields in which the public interest calls for uniformity of treatment, this Court has recognized the doctrine of applicability of federal rather than State law in situations where a federal subject matter is involved.

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* "The laws of the several States, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." 28 U. S. C. 1652. This carries forward the substance of Section 34 of the Judiciary Act of September 24, 1789, 1 Stat. 92. In accordance with *Guaranty Trust Co.* v. *York*, 326 U. S. 99 (1945), equity suits are expressly included in the 1948 revision.

It is submitted that this principle should be applied in the case at bar. The entire process of transmitting government bonds through the Federal Reserve System in accordance with Treasury regulations for redemption should be governed by federal law. This is necessary in order to protect the government's vital interest in the federal financial structure. The type and variety of government securities to be issued is a matter for determination by the federal government. Maintaining the integrity of the structure so established is likewise clearly a matter of concern to the federal government.

Petitioner contends that it is difficult to believe that the salability of government securities will be substantially affected one way or the other by the rules applied to determine the rights and privileges of owners and transferees *inter sese.* In any event, petitioner asserts, the United States is concerned with the interest and attitude of the first purchaser of government bonds, rather than with the protection of parties subsequently dealing with them.

This argument overlooks the fact that much of the value of certain types of government bonds depends upon their free transferability and the willingness of subsequent parties to engage in dealings with respect to such bonds. The value of the bonds to the original purchaser is thus dependent upon the rules of law protecting subse-

quent parties who act in good faith in participating in transactions with respect to such bonds. If such parties may not safely engage in such transactions, the value of the bond to the first purchaser and its salability by the government is materially affected.

That purchasers desire readily transferable and negotiable bonds, and are willing to run the attendant risks in order to obtain the advantageous features desired, is shown by statistics with regard to the volume of bearer bonds outstanding in proportion to the volume of other types of securities. Purchasers desirous of the protection which petitioner would provide may now obtain protection by purchasing non-negotiable registered or non-transferable bonds. But when purchasers indicate a preference for negotiable bearer bonds, and the government by issuance of this type of security indicates the vital importance of that type of bond in the financial structure of the government, it is certainly essential that the integrity of such decisions be protected against interference by State law.

It has long been well settled law that the Treasury regulations having the force of law may validly attach to government obligations the status of non-transferability. *U. S.* v. *Janowitz*, 257 U. S. 42, 45 (1921); *U. S.* v. *Sacks*, 257 U. S. 37, 41 (1921); *U. S.* v. *Dauphin Deposit Trust Co.*, 50 F. Supp. 73, 75-77 (M. D. Pa. 1943); *Guldager* v. *U. S.*, 204 F. 2d 487, 489 (C. A. 6, 1953).

The government has the same power to prescribe that bonds shall be transferable as it has to prescribe that they shall not be. The integrity of the nation's fiscal system is involved to the same extent under either alternative and the government has the same vital interest in protecting the functioning of the type of financial structure which it has established.

Even the dissenting judges below concede that the nature of the obligation is so far controlled by federal law, that that law may govern the question of assignability. But they believe that State law determines whether a given transaction operates as an effective assignment (R. 505, 226 F. 2d 303).

But if the transactions of assignment were subject to State law, it is plain that the integrity of the federal government's decisions regarding its financial structure would be impaired. The States would be at liberty to frustrate and defeat entirely the negotiable status which the federal government sought to attach to this type of its obligations.

If Pennsylvania or any other State should come to think that thefts of government bonds were so numerous as to create a problem similar to that presented by stolen automobiles, such State would be perfectly free to provide that no government bearer bond within its jurisdiction could be transferred without endorsement of the names and ad-

dresses of the parties, and could also provide that before such a transaction of assignment should be valid a certificate must be obtained from the Secretary of the Commonwealth or the head of the State Police that no claim was on file that such bonds had been stolen. It is very plain that such a system of analogizing the sale of government bearer bonds to the sale of an automobile with the title registered in the State capital would completely frustrate the federal policy of protecting the readily negotiable quality of its bearer bonds.

Perhaps the most conclusive reason militating against the application of State law is one that was pointed out in the opinion of the Court below (R. 498, 226 F. 2d 299).

> The desirability of having uniformity of results in a determination of the rights of transferees of such bonds is just as important as having uniformity in a determination of the rights and liabilities of the United States, a party to the original obligation, so that the vast amounts of government bonds presently in circulation can be free of the myriad of doubts which would arise if the rights of the transferees must be determined by the several and diverse laws of the states, for then a purchaser of such bonds would, of necessity, in each case have to make inquiry as to the prior route taken by the bonds.

This disadvantage would be experienced whether or not the States undertook to pass restrictive legislation of the sort mentioned above. Simply as a matter of making certain what rights were created in transferees under the applicable State laws, it would be necessary for the purchaser of negotiable bonds to have a record of the prior transactions and of the places where they occurred. The need for preserving such a pedigree of the prior transfers and lineage of the bonds would in fact result in a complete transformation of the nature of the instruments themselves.

Instead of being freely negotiable bearer bonds they would in fact be instruments passing under endorsements, and the endorsements would have to show the time and place of each transaction. To require such an Odyssey describing the wayfarings of each of the myriad government bonds in circulation would inevitably paralyze the market for such securities and interfere with the discretion of the federal government to determine whether a particular issue of obligations should be negotiable bearer bonds or registered or nontransferable bonds.

In view of the foregoing reasons it is plain that there is a vital public interest in uniformity which requires the application of federal rather than State law with respect to the subject matter involved in the case at bar.

II

A "conduit" or intermediary in the process of transmitting Government bearer bonds for redemption in good faith and in strict accordance with Treasury Regulations is not liable for conversion of the bonds handled.

Assuming that federal law governs the process of transmitting government bearer bonds through the channels of the Federal Reserve System for redemption, we turn to the question: What are the liabilities of a bank or individual* acting as a "conduit" or intermediary in that process? Is such a party liable for conversion of bonds handled, in the absence of bad faith? Must such party have the status of "holder in due course" in order to be free from liability?

The trial court ruled that the "conduit" bank had the burden of proving its status as "holder

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* The positions of Parnell and the Bank in Indiana are identical insofar as their status as "conduit" or intermediary in the collection process is concerned. They are somewhat different with respect to the evidence as to good faith. The F. B. I. circular to banks in general was not admitted against Parnell, but might have been regarded as remote evidence of notice to the Bank. (R. 241, 244-49). But even so the Bank acted in good faith, under the holding in *Graham* v. *White-Phillips Co.*, 296 U. S. 27, 28-30 (1935), that inadvertent inattention after actual notice does not negate good faith. Against Parnell, but not the Bank, there was evidence given by Rocco to the effect that Parnell was paid more than $650 out of the proceeds of the bonds. But this payment, whatever the amount was, took place *after completion of the transaction with respect to the bonds*, and would be extremely remote evidence as to Parnell's good faith at the time of the transactions. A verdict should have been directed in favor of Parnell as well as the Bank.

in due course" of the bonds involved in the case. That concept includes, *inter alia,* proof of giving value. The trial judge said "Had they been purchased for investment, for this bank's portfolio, then I would have agreed with you" and would have granted a directed verdict in favor of the Bank (R. 402. See also R. 222, 228, 230, 235, 260, 264-65, 404-5, 420-22, 446).

We submit that the public interest requires that if a purchasing bank would be protected, a "conduit" bank should be protected *a fortiori.*

The Government's interest in salability of this type of bond and in ensuring free transferability thereof, as well as the usefulness and attractiveness of government bearer bonds to investors as a convenient method of holding highly liquid assets in a form which is the practical equivalent of cash,* would be seriously impaired by adoption of the rule advocated by the minority opinion of the Court of Appeals. That rule, as we have seen in Point I of this brief, would practically transform the nature of bearer obligations into instruments passing by endorsement or requiring a record of the past transfers of the bonds and the time and place where such transactions occurred. This would completely destroy the usefulness of government bearer bonds as a readily circulating

* Indeed much of our circulating currency consists of government obligations which are non-interest-bearing and are printed on small pieces of paper.

liquid medium of investment with flexibility practically equivalent to cash. Such annihilation of the distinctive features of bearer bonds in the hands of the purchasers would correspondingly frustrate and defeat the jurisdiction committed by Congress to the fiscal authorities of the Government to fashion the debt structure in accordance with a flexible and discretionary pattern. Bearer bonds, as we have known them in the past, would be eliminated from the picture. The Treasury would be limited to issuance of securities having the characteristic features of registered or non-transferable bonds.

It is unnecessary to elaborate upon the disastrous consequences of such a situation. On the other hand, the result reached by the majority of the Court of Appeals, in accordance with prior federal decisions, preserves and protects the vital interests both of the financial community and of the Government in maintaining the integrity of the essential characteristics of government bearer bonds.

Under federal law a "conduit" bank is liable only if bad faith is proven. The burden of proof that the bank had notice of any infirmity or irregularity in the transaction is placed upon the party seeking to hold the "conduit" bank liable. Federal law recognizes that if a purchaser bank is protected, a "conduit" bank must *a fortiori* be protected.

Any other rule would paralyze the banking system and clog the normal channels of commerce. It would be utterly irrational and impracticable to hold a bank which merely acts as an agency for the transmission of bonds and disbursement of the proceeds collected to a higher standard of care and diligence than is required of a bank which occupies the status of a prospective purchaser of such bonds for investment. Reason and logic dictate that the investor should be held to a stricter standard than the instrumentality of commercial intercourse. A contrary rule would be absurd and disastrous. A "conduit" bank is entitled to protection *a fortiori* in a situation where a purchasing bank would be protected. The trial judge's ruling was clearly wrong, and the decision of the Court of Appeals clearly correct.

That decision has the support of authority as well as of reason. The leading case cited in the Court's opinion (R. 499, 226 F. 2d at 300) is *Murray* v. *Lardner,* 2 Wall. 110 (1864). This Court there said:

> The general rule of the common law is, that, except by a sale in market overt, no one can give a better title to personal property than he has himself. The exception from this principle of securities, transferable by delivery, was established at an early period. It is founded upon principles of commercial policy, and is now as firmly fixed as the rule to which it is an exception. (p. 118).

The Court continued:

> *Suspicion of a defect of title or the knowledge of circumstances which would excite such suspicion in the mind of a prudent man, or gross negligence on the part of the taker, at the time of transfer, will not defeat his title. That result can be produced only by bad faith on his part.*
>
> *The burden of proof lies on the person who assails the right claimed by the party in possession.*
>
> Such is the settled law of this court, and we feel no disposition to depart from it. (p. 121, italics supplied).

The securities stolen from Lardner's home and sold through Murray, a reputable New York broker, were railroad bonds, payable to bearer. The decision would apply *a fortiori* in the case of government bearer bonds, because of the greater safety of the government bonds, which, as stated before, furnish a medium equivalent to cash in convenience as an investment for liquid capital. The "commercial policy" in maintaining free negotiability would be all the stronger in the case of government obligations.

The rule of *Murray* v. *Lardner* was reaffirmed in a famous case involving government bonds, *Texas* v. *White,* 7 Wall. 700, 735 (1868).* *Murray*

* The Court held, however, that the rule was inapplicable since the bonds in that case were taken after maturity. This question, insofar as it is of concern in the case at bar, will be treated in Point III of this brief. We contend that the transactions here involved took place before maturity of the bonds handled.

v. *Lardner* has never been overruled, but has often been followed.* It was cited as late as 1935.**

Important State courts have also accorded protection to "conduit" parties who act in good faith. In Massachusetts, *Pratt* v. *Higginson,* 230 Mass. 256 (1918), so held in a case involving government and public utility bonds. In New York, the highest court of that State, on which Chief Judge (later Mr. Justice) Cardozo and other eminent judges then sat, spoke to the same effect in *Gruntal* v. *U. S. F. & G. Co.,* 254 N. Y. 468 (1930). The same result was reached by the Supreme Court of Pennsylvania in *First National Bank* v. *Goldberg,* 340 Pa. 337, 341-42 (1941). The Restatement, Agency, sec. 349, comment g, and Torts, sec. 233, subsection 4 take the same view; and apparently the only case to the contrary is *Kimball* v. *Billings,* 55 Me. 147, 152 (1867), but there the agent who sold the bonds still held the proceeds (pp. 149-50; *Smith* v. *Harlow,* 64 Me. 510, 516-17 (1874)). It is obvious that the federal and State cases relieving "conduit" parties who act in good

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* Among the cases where *Murray* v. *Lardner* was followed are *Hotchkiss* v. *Banks,* 88 U. S. 354, 359 (1874); *Ry. Co.* v. *Sprague,* 103 U. S. 756, 760 (1880); *Morgan* v. *U. S.,* 113 U. S. 476, 491 (1885); *Kneeland* v. *Lawrence,* 140 U. S. 209, 212 *(1891); County of Presidio* v. *Noel-Young Co.,* 212 U. S. 58, 70 (1909).

** *Graham* v. *White-Phillips Co.,* 296 U. S. 27, 32 (1935).

faith are sound in principle and should be followed.*

Restatement, Agency, Comment g to sec. 349 states:

> The agent may be protected although his principal is not privileged. Thus, if an agent sells, on account of his principal a negotiable instrument, the holder of which has the power to pass title, the agent does not commit conversion if he sells such instrument without notice of the rights of the person entitled to possession, although his principal is not a bona fide holder of the instrument.

Restatement, Torts, sec. 233 (4) reads:

> The statement in subsection (1) [conversion of chattel by agent] is not applicable to an agent or servant who disposes of current money or a document negotiable by

* It may be of significance that a conservative authority on conversion favors exemption from liability for conversion of common carriers and warehousemen who act as a "mere conduit pipe" in connection with *chattels other than negotiable instruments.* Edward Henry Warren, *Trover and Conversion* (1936) 90-92. "It is one thing to require a cotton broker to determine at his peril whether he is buying from a person authorized to sell. It is a very different thing to require a person employed only to store or transport to determine at his peril whether the goods have been properly brought to him." By parity of reasoning, and *a fortiori*, in the case of bearer bonds a "conduit" bank which merely handles the bonds for redemption and disburses the proceeds collected should be relieved from liability for conversion in a situation where a bank purchasing the bonds for investment would be protected.

> common law or by statute pursuant to a transaction by which the transferee becomes a holder in due course of such money or document, unless the agent or servant knows or has reason to know that his principal or master does not have authority so to dispose thereof.

These statements indicate a policy in favor of protecting a "conduit" party, although the terminology of "holder in due course" is employed, which is not properly applicable in a "conduit" situation. It is out of place to refer to "holders" and "negotiation" when the process is actually one of "presentation" to the obligor for payment. Britton on Bills and Notes (1943) 1035: "Instruments are 'negotiated' to purchasers . . . Instruments are not usually negotiated to principal debtors and other payors but are 'delivered up,' or 'surrendered' to the payor."

Parnell at no time negotiated in any manner the bonds here involved, nor was there any negotiation on the part of the Bank of Indiana. They simply forwarded the bonds for collection through the channels prescribed by Treasury Regulations. They gave no value when they took the bonds, and parted with no value other than the proceeds collected when they disbursed such proceeds. It is awkward and artificial to apply the categories and concepts of the Negotiable Instruments Law to such a "conduit" situation, as Judge Goodrich

tries to do in his dissenting opinion. Disregarding such semantic concepts, this Court should apply as the appropriate federal rule suitable to the situation the established principle protecting such "conduit" or intermediary parties in the collection process from liability for conversion.*

The Congress, and the Secretary of the Treasury through regulations having the force of law, have determined that these bonds should be issued in bearer form and that they should be transferable by delivery. The legal consequence of such determination is not merely that the bonds may be discharged by payment to the person presenting them (indeed that subject is separately covered elsewhere in the Regulations) but also that in transactions in the market place between other parties *inter sese* the bonds may safely be dealt

* The awkwardness and artificiality exhibited by the attempt of the minority below to adjudicate the status of "conduit" parties in terms of the Procrustean categories of the N. I. L., instead of applying a just and rational rule fashioned in accordance with the traditional judicial technique of the common law to fit the actual facts and felt needs of the situation involved, illustrates the wisdom of the observations made in 1870 by Mr. Justice Holmes on "Codes, and the Arrangement of the Law." Because of the inevitable inflexibility and fortuitousness of statutes, they serve as a sorry substitute for the uncrystallized juices of life which must animate the judicial process if justice is to be rightly administered. "If the code is truly law, the court is confined to verbal construction . . . and must decide the case wrong." Harry C. Shriver, *Justice Oliver Wendell Holmes: His Book Notices and Uncollected Papers* (1936) 61-64. Similarly, if the N. I. L. is to be accepted as truly authoritative in the case at bar, the judicial function will be limited to the type of mechanical manipulation of verbal tokens which the minority opinion displays, and will necessarily culminate in a result which is wrong.

with as bearer securities which can be transferred freely like currency or negotiable instruments; and hence that a "conduit" bank serving as intermediary in the collection process is relieved of liability for conversion.

Accordingly, we submit that the "conduit" parties in the case at bar are entitled to the protection of the federal law as above set forth. Reason and precedent concur in this conclusion.

III

Government bonds, redeemable but not yet due and payable, are not overdue paper.

The bonds involved in the case at bar showed on their face that they were payable May 1, 1952, and that the right was reserved to call them on any interest date on or after May 1, 1944 (R. 449). They were in fact called on May 1, 1944. The Bank in Indiana had knowledge of the call, but Parnell did not, at the time of the transactions involved (R. 355, 312-13).

By the terms of the bonds, interest was discontinued after the call date (R. 450). When the bonds were forwarded by Parnell and the Bank to the Federal Reserve Bank of Cleveland, inoperative interest coupons for the period subsequent to May 1, 1944, were attached to the bonds

(R. 355). This was required by Treasury Regulations.*

Did the presence of these inoperative interest coupons make the bonds overdue paper, and deprive the "conduit" parties of the protection they would otherwise have received under the federal law as set forth in Point II of this Brief, *supra?*

It will be recalled that in *Texas* v. *White,* 7 Wall. 700, 735 (1868), the Court treated the bonds there in suit as overdue after December 31, 1864, the date when they were "redeemable," and the date of the last interest coupon attached. The holders of those bonds purchased them as a speculation for a few cents on the dollar. The circumstances surrounding those particular bonds were highly unusual and *sui generis.* They were issued in settlement of a boundary dispute with Texas. That State passed a law requiring the Governor's signature before they could be transferred from the State treasury. During the Civil War, Texas repealed that law, in order to facilitate the transfer of some of the bonds to one White and one Chiles in order to further the Confederate cause by purchasing supplies. Apparently no supplies were obtained, and after the war the "reconstructed" State of Texas asserted its title to the bonds in suit, claiming they were part of the batch delivered to White and Chiles. The climate of

* Treasury Department Circular No. 666, section 307.6. 31 C. F. R. 307.6. See Appendix, *infra.*

Reconstruction sentiment undoubtedly made the Court astute to find grounds for upholding the State's title rather than that of the speculators who sought to aid the Confederate cause.*

But even the language used in *Texas* v. *White* recognizes the distinction between the date when a bond is "payable" and when it is "redeemable" if that distinction is expressed on the face of the bond.** The bonds in *Texas* v. *White* did not express such a distinction; the fact that the interest coupons extended only to December 31, 1864, indicates that "redeemable" was used in the sense of "payable."

But even under *Texas* v. *White* the bonds involved in the case at bar would not have been overdue. The distinction was expressed on the face of the bonds, and interest coupons were attached continuing beyond the date when the bonds became redeemable on call up until the final date when the bonds became due and payable.

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* Several rather questionable rulings were made in *Texas* v. *White*, doubtless due to wartime sentiment. Thus it was held that the first Texas law restricting alienation of the bonds was valid, but that the repealing act was not, being in aid of rebellion, and that White and Chiles got no title to the bonds. (This was overruled in *Morgan* v. *U. S.*, 113 U. S. 476, 494-96 (1895)). The Court was apparently unwilling to treat the Texas legislation and public notoriety regarding the bonds as sufficient proof of notice to the purchasers, but found that the bonds were overdue when purchased.

** 7 Wall. at 735. On this point see also *Morgan* v. *U. S.*, 113 U. S. 476, 497 (1885).

In any event, the questionable holding in *Texas* v. *White* that "redeemable" was there equivalent to "payable," was qualified in *Vermilye Co.* v. *Adams Express Co.*, 21 Wall. 138, 145 (1874).*

But a leading case where the decision is squarely in point was subsequently handed down by this Court. *Morgan* v. *U. S.*, 113 U. S. 476, 497-501 (1885).

In the *Morgan* case the bonds were redeemable on July 1, 1870, and payable on July 1, 1885 (p. 479). Under the terms of the Act of July 14, 1870, 16 Stat. 272, they were exchangeable for new bonds to be issued under that Act at a lower interest rate (p. 480, 503-4). On July 30, 1878, October 31, 1878, and March 18, 1879, calls for redemption were made (p. 482). During 1879 a syndicate including J. P. Morgan and other prominent bankers bought in London, from respectable parties, bonds which had been called, and they knew of the call. They did not know that some of the bonds purchased had been stolen on October 27, 1878, from the Manhattan Savings Bank. (pp. 481-83). Many millions of these bonds were dealt in on the London market after the call (p. 485).

The Court held that the bonds did not become

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* There the stolen notes were expressly made payable on July 15, 1868. The fact that they were convertible into other securities did not qualify the definiteness of the due date.

overdue until after the date when they were *due and payable* (p. 501). They did not become overdue upon the date of the call, when they became *redeemable.*

Called government bonds, the Court points out, do not become dishonored or *functus officio* upon being called. They merely cease to bear interest. A holder to whom interest is not the prime consideration may properly retain his bonds until the due date because of their utility and value as a safe and convenient repository of liquid capital, circulating almost as freely as money (p. 500).

In the *Morgan* case the Court emphasized that call for redemption effected no change in the original rights of the holder except the loss of interest. The bond is "not overdue, in the commercial sense, till after the day of unconditional payment . . . it seems to us quite plain that it could not be considered an overdue obligation, in the sense in which that term is applied to ordinary commercial paper, until after the time limit fixed for final payment had passed." (p. 499).

The Court continued:

> The title of the purchaser of overdue negotiable paper, such as a bill of exchange or a promissory note, stands on the same footing as if it had been dishonored by a refusal to accept or pay, and had been put under protest. When transferred after it has become due, although not reduced to

the rank of an ordinary chose in action, the legal title to which cannot pass by assignment or delivery, it carries on its face the presumption which discredits it, and deprives it of that immunity which, while the time for payment was still running, was secured to it in favor of a bona fide purchaser for value without actual notice of any defect, either in the obligation or the title. This was put by Mr. Justice Butler, in *Brown* v. *Davies,* 3 T. R. 80, on the ground that to take an overdue note or bill was "out of the common course of dealing." Ordinarily a note or bill when due becomes *functus officio,* because it was made to be paid at maturity, and if it fails of its intended operation and effect, the presumption is that it is owing to some defect, which has furnished a sufficient reason to the party apparently chargeable for not having punctually performed his obligation. In the strong language of Lord Ellenborough in *Tinson* v. *Francis,* 1 Camp. 19, "after a bill or note is due it comes disgraced to the indorsee."

No such presumption, in our opinion, arises to affect the title of a holder of the bonds of the United States, such as those now in question, acquired by a bona fide purchaser for value prior to the date fixed in the bonds themselves for their ultimate payment; for, as we have already shown, the only change in the original effect of the contract by the exercise of the right of earlier redemption is to stop the obligation to pay future interest. And as against one

> choosing for any purpose of his own to retain his bond as a continuing security for the value it always represents, having impressed upon it by the law of its creation the faculty of passing from hand to hand as money, and therefore just as useful in the pursuits of trade and the exchanges of commerce and banking as so much money in the form of coin or bank notes, and more convenient because more portable, no such presumption can be entertained on the ground that its continued circulation is not in the due course of business, that it has fully performed all its intended functions, and that it has been in any sense dishonored by a refusal on the part of the obligor to fulfil its obligation. On the contrary, supposing the purchaser bound to know, what in fact does not appear on its face, that the bond has been called for redemption under penalty of a stoppage of interest after three months, the very notice, which, it is said, discredits his title, is in fact an advertisement, not that the maker has any ground to refuse payment, but that the previous holder preferred to hold the security for the money rather than to accept the money which it represents. (pp. 499-501).

The *Morgan* case has never been questioned, nor is it diluted by the passage which petitioner quotes from Mr. Justice Cardozo's opinion in *Smyth* v. *U. S.*, 302 U. S. 329, 353 (1937):

> The so-called redemption provisions of

> the bonds are provisions for the acceleration of maturity at the pleasure of the Government, and upon publication of the notice of call for the period stated in the bonds the new date became substituted for the old one as if there from the beginning.

This was merely a colorful and emphatic way of stating that interest should cease upon the date specified in the call.* The question in the *Smyth* case, as stated by Mr. Justice Cardozo's opinion, was:

> Was a notice of call issued by the Secretary of the Treasury for the redemption of Liberty Loan bonds effective to terminate the interest on the bonds from the designated redemption date? (pp. 348-49).

The plaintiff in that case had brought suit upon an interest coupon bearing date *subsequent to the redemption date* specified in the call (p. 351).

The real point in controversy was whether the bonds were payable in gold, as called for by their terms, or in such currency as was legal tender at the date of redemption (p. 358).

The bondholders' theory was that the subsequent interest coupons were valid because the re-

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* There is no conflict in substance, as petitioner contends, between this language and what is said in *Morgan* v. *U. S.* at 113 U. S. 498.

demption notice was ineffective; the notice was ineffective because it was fraudulent or illusory as the Government did not intend to pay *in gold as called for by the bond* on the redemption date. (p. 354).

As stated by the dissenting Justices:

> The right to redeem and pay the bonds at face value after notice was reserved—nothing else. Did the United States give notice of a bona fide purpose so to redeem and pay? If not they cannot properly claim to have exercised their option to mature the obligation. That they did not honestly comply with this necessary preliminary becomes obvious upon consideration of the circumstances and pertinent legislation. . . . The Government simply has not in good faith complied with a condition precedent. It has never given notice of purpose to pay the obligation according to its terms. Its suggestion was to make payment of another kind. (p. 366).

As the Court of Appeals says (R. 502, 226 F. 2d 301), "Smyth was not concerned with the Morgan problem and nowhere is Morgan referred to in the Smyth opinion."

Mr. Justice Cardozo does state that the bondholders "were not under a duty to do anything at all at the accelerated maturity, though they

were privileged, if they pleased, to present the bonds for payment." (p. 357).

This is in accord with the *Morgan* holding that the holders "had a right, without prejudice, except as to loss of interest, to wait without demand for the whole period, at the expiration of which the bond was unconditionally payable." (113 U. S. at 501).

If parties dealing with the bonds involved in the case at bar could thus properly regard them as not being overdue until May 1, 1952, the date upon which they were payable, (rather than the earlier date of May 1, 1944, when they became redeemable), did the presence of inoperative interest coupons change the situation or constitute any sort of constructive notice of irregularity?

Here, too, the law is clear that the interest coupon is an independent bearer instrument separate from the bond, and that the presence of overdue* interest coupons does not constitute notice of any

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* It should be noted that the coupons attached to the bonds here involved were not *overdue*, but merely *inoperative*, because they became void after the call. The Government was not in default, because it did not owe any duty to pay with respect to such inoperative coupons. Chafee, "Rights in Overdue Paper," 31 Harv. L. R. 1104, 1126 (1918), advocates the view that equities of ownership, as distinguished from equities of liability, should not be recognized to the detriment of bona fide takers of overdue paper. On this analysis, petitioner's claim here would be an equity of ownership. The Government's known solvency would preclude any equity of liability.

infirmity with respect to the principal amount of the bond to which they were attached. *Ry. Co.* v. *Sprague,* 103 U. S. 756, 760-61 (1880); *County of Presidio* v. *Noel-Young Bond & Stock Co.,* 212 U. S. 58, 74-75 (1909).

Accordingly, if this Court accepts our contentions in Points I and II *supra* with regard to the applicability of federal law and the non-liability of "conduit" parties for conversion, the presence of inoperative coupons upon the bonds covering the period between the date upon which they were redeemable and the date upon which they were payable would not require modification of the conclusions reached. Knowledge of the call on the part of the Bank in Indiana would not constitute notice of any irregularities or bad faith; and Parnell did not know that the bonds had been called.

CONCLUSION

The process of transmitting government bonds through the Federal Reserve system for payment, we submit, is governed by federal law. The *Erie* rule does not apply in the case at bar, but rather the doctrine that federal law governs federal subject matter where uniformity is desirable. That doctrine extends to a number of fields, and was applied to government obligations in the *Clearfield* case. *Clearfield* is not an exceptional or undesirable holding which should be restricted to

its own particular facts and limited to situations where the United States is a party litigant. The case at bar presents a situation where uniformity is desirable in the public interest. Both the welfare of the financial community and the Government's discretionary power with respect to the public debt structure require maintenance of the integrity of the distinctive characteristics of government bearer bonds. These would be obliterated, and such obligations would in practice be transformed into registered or non-transferable securities if a rule requiring application of State law and a record of the bonds' Odyssey were to be accepted by this Court.

A "conduit" bank, serving only as an intermediary in the collection process and forwarding government bearer bonds in strict accordance with Treasury Regulations for redemption, can not in the absence of proof of bad faith be held liable for conversion of the bonds handled.

It would be unjust, impracticable, illogical, and would paralyze the channels of banking and commerce for this Court to require of "conduit" banks a standard of care higher than that required of banks purchasing government bearer bonds as an investment. Where, as in the case at bar, a bank purchasing the bonds for investment would admittedly be relieved from liability for conversion, we earnestly submit that a "conduit" bank should be protected *a fortiori*.

The fact that the bonds involved in the case at bar had been called for redemption and that inoperative coupons were attached thereto at the time they were transmitted does not diminish the protection from liability for conversion to which these "conduit" parties are entitled.

The judgments of the Court of Appeals for the Third Circuit should be affirmed.

Respectfully submitted,

EDWARD DUMBAULD,
Attorney for Respondent.

SEPTEMBER 1956.

APPENDIX

The Home Owners' Loan Act of June 13, 1933, 48 Stat. 129, as amended by Act of April 27, 1934, 12 U. S. C. 1463 (c), provides in pertinent part: [Italics supplied.]

In order to provide for applications filed before May 28, 1935, for applications filed within thirty days thereafter, and for carrying out the other purposes of this section, the Corporation is authorized to issue bonds in an aggregate amount not to exceed $4,750,000,000, which may be exchanged as hereinafter provided, or which may be sold by the Corporation to obtain funds for carrying out the purposes of this section or for the redemption of any of its outstanding bonds; and the Corporation is further authorized to inincrease its total bond issue for the purpose of retiring its outstanding bonds by an amount equal to the amount of the bonds to be so retired (except bonds retired from payments of principal on loans), such retirement to be at maturity or by call or purchase or exchange or any method prescribed by the Board with the approval of the Secretary of the Treasury: *Provided,* That no bonds issued under this subsection, as amended, shall have a maturity date later than 1952. *Such bonds shall be in such forms and denominations, shall mature within such periods of not more than eighteen years from the date of their issue, shall bear such rates of interest not exceeding 4 per*

centum per annum, shall be subject to such terms and conditions, and shall be issued in such manner and sold at such prices, as may be prescribed by the Corporation, with the approval of the Secretary of the Treasury. Such bonds shall be fully and unconditionally guaranteed both as to interest and principal by the United States, and such guaranty shall be expressed on the face thereof, and such bonds shall be lawful investments, and may be accepted as security, for all fiduciary, trust, and public funds, the investment or deposit of which shall be under the authority or control of the United States or any officer or officers thereof. In the event that the Corporation shall be unable to pay upon demand, when due, the principal of, or interest on, such bonds, the Secretary of the Treasury shall pay to the holder the amount thereof which is hereby authorized to be appropriated, and thereupon to the extent of the amount so paid the Secretary of the Treasury shall succeed to all the rights of the holders of such bonds. The Secretary of the Treasury, in his discretion, is authorized to purchase any bonds of the Corporation issued under this subsection which are guaranteed as to interest and principal, and for such purpose the Secretary of the Treasury is authorized to use as a public-debt transaction the proceeds from the sale of any securities hereafter issued under sections 752, 753, and 757 of Title 31, and the purposes for which securities may be issued under such sections are extended to include any purchases of the Corporation's bonds hereunder. The

Secretary of the Treasury may, at any time, sell any of the bonds of the Corporation acquired by him under this subsection. *All redemptions, purchases, and sales by the Secretary of the Treasury of the bonds of the Corporation shall be treated as public-debt transactions of the United States.* The bonds issued by the Corporation under this subsection shall be exempt, both as to principal and interest, from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States or any District, Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority. . . .

TREASURY REGULATIONS

31 Code of Federal Regulations (1949 edition):

306.3. *Coupon bonds and notes.* United States coupon bonds and notes are payable to bearer, and title thereto passes by delivery, without indorsement and without notice to the Treasury Department. . . .

306.24. *Redemption of bonds and notes; definition.* The term "payment" as ordinarily used by the Treasury Department applies to the payment of United States bonds and notes at maturity, while the term "redemption" is ordinarily used to cover payment before maturity pursuant to a call for redemption in accordance with the

terms of the bonds or notes. For the purposes of this part, however, the terms are used interchangeably, and no distinction need be drawn between them.

306.25. *Redemption of bonds and notes; interest stops.* Bonds and notes will cease to bear interest on the date of their maturity, unless called for earlier redemption in accordance with their terms, in which event interest ceases on the date fixed for redemption.

306.26. *Redemption of bonds and notes; coupon bonds and notes.* United States bonds and notes in coupon form are payable to bearer, and accordingly payment will be made in due course to the person surrendering them for redemption. Coupon bonds or notes which have become due and payable, whether on maturity or by virtue of a call for redemption, should be presented and surrendered to the Treasurer of the United States in Washington, or to any Federal Reserve bank or branch thereof, at the expense and risk of the holder; and should be accompanied by appropriate written advice. All interest coupons due and payable on or before the date of redemption should be detached from the bonds or notes and collected in ordinary course. Coupon bonds or notes called for redemption prior to maturity should, when surrendered, have all coupons attached which mature subsequent to the date of redemption. If any such subsequently maturing coupons are not so at-

tached, the bonds or notes will nevertheless be redeemed, but the full face amount of any missing coupons will be deducted. The amounts so deducted will be held in the Treasury to provide for the redemption of such missing coupons as may subsequently be presented.

306.79. *Coupon bonds or notes lost or stolen.* (a) The Treasury Department can grant no relief on account of lost or stolen coupon bonds or notes. United States bonds and notes in coupon form are payable to bearer, and title thereto passes by delivery, without indorsement, and without notice to the Treasury Department. Under generally recognized principles of law an innocent purchaser for value without notice before maturity acquires good title to coupon bonds or notes even though reported lost or stolen, and no proof of ownership is required when coupon bonds or notes are presented in regular course to the Treasury Department, or its designated agencies, for payment, exchange, or conversion. The Treasury Department assumes no responsibility whatever with respect to coupon bonds or notes reported lost or stolen and enters no stoppages or caveats against their payment, exchange, or conversion. This is the long-established policy of the Treasury, and is in accordance with the following public announcement made by the Secretary of the Treasury on April 27, 1867, and reaffirmed and republished from time to time as to United States

bonds and notes in coupon form reported lost or stolen:

In consequence of the increasing trouble, wholly without practical benefit, arising from notices which are constantly received at the Department respecting the loss of coupon bonds, which are payable to bearer, and of Treasury notes issued and remaining in blank at the time of loss, it becomes necessary to give this public notice, that the Government can not protect, and will not undertake to protect, the owners of such bonds and notes against the consequences of their own fault or misfortune.

Hereafter all bonds, notes, and coupons, payable to bearer, and Treasury notes issued and remaining in blank, will be paid to the party presenting them in pursuance of the regulations of the Department, in the course of regular business; and no attention will be paid to caveats which may be filed for the purpose of preventing such payment.

(b) The Treasury Department does not undertake to furnish any information with respect to the presentation of coupon bonds or notes reported lost or stolen, but it will, wherever possible, in order to assist in tracing lost or stolen securities, furnish, upon appropriate written inquiry, such information as may be available in the Department as to whether or not bonds or notes reported lost or stolen have already been presented, and, if already presented, as to the

source from which they were received. United States coupon bonds and notes are customarily handled in the regular course of business without reference to serial number, and in most cases, therefore, it is improbable that any information will be available as to the source from which received.

307.1. *Definitions—*

(b) *Payment.* As ordinarily used by the Treasury Department, the term "payment" refers to the payment of securities at maturity, while the term "redemption" refers to payment before maturity pursuant to a call for redemption in accordance with the terms of the securities. For the purpose of the regulations in this part, however, the terms are interchangeable, and the term "redemption" may refer to the discharge of a security by payment either at maturity, or before maturity pursuant to a call for redemption.

307.6. *Missing coupons.* If any coupons bearing dates subsequent to the redemption date of the securities are missing from bearer securities presented for redemption, the securities nevertheless will be redeemed, but the full face amount of any such missing coupons will be deducted from the payment to be made on account of such redemption, and any amounts so deducted will be held in the Treasury to provide for adjustments or refunds on account of such missing coupons as

may subsequently be presented: *Provided, however,* That if it is proved to the satisfaction of the Secretary of the Treasury that any such missing coupons (bearing dates after the redemption date) have been in fact destroyed the amount of such destroyed coupons will not be deducted from the payment on account of redemption, but in any such case the Secretary of the Treasury may require a bond of indemnity or a guarantee by an incorporated bank or trust company.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 22

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION,
Petitioner,

vs.

FIRST NATIONAL BANK IN INDIANA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENT FIRST NATIONAL BANK IN INDIANA, PA.

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IN THE

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No. 22

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION,

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FIRST NATIONAL BANK IN INDIANA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENT FIRST NATIONAL BANK IN INDIANA, PA.

Counter Statement of Questions Presented

1. Can a member bank of the Federal Reserve System be held liable for conversion of Home Owners Loan Corporation bonds payable to bearer and guaranteed by the United States Government by sending them to the Federal Reserve Bank for redemption or collection in the condition received and by paying the proceeds collected to its customer less registration and transportation expenses when there is no evidence of notice of defect or infirmity in the bonds?

(Argued under heading II, Page 14.)

2. Is Federal law applicable to determine the duties, rights and liabilities of parties in transactions involving Home Owners Loan Corporation bonds, payable to bearer, guaranteed by United States Government, and issued under Act of Congress authorizing Treasury regulations concerning the redemption or collection thereof by member banks of the Federal Reserve System?

(Argued under headings III and IV, Pages 19 and 27.)

3. Did the trial court err in permitting Exhibits 7, 8, 9 and 10 to be read in evidence to the jury as notice to First National Bank in Indiana without proof of knowledge of their contents having reached said defendant bank?

(Argued under heading V, Page 32.)

Statutes Involved

Conformity Act of September 24, 1789 U. S. Statutes at Large Volume 1, page 92, as amended, Title 28 U. S. C. A. Section 1652.

Statutory provisions known as the "Home Owners Loan Act of 1933" Title 12 U. S. C. A. Section 1461 *et seq.*, as amended and approved by the Act of April 27, 1934, and Treasury Regulations issued thereunder.

The Conformity Act and pertinent excerpts from Treasury Regulations are printed in the Appendix at end of this Brief.

Statement of the Case

In order to avoid confusing the facts which relate only to the First National Bank in Indiana, Pa. with those which relate to the other defendants, and for the sake of

accuracy, we deem it necessary to make the following statement of the case somewhat in detail.

This is a civil action brought by Bank of America National Trust and Savings Association, of San Francisco, California, against four defendants as follows:

Arthur A. Rocco, of Homer City, Pennsylvania;
Gilbert S. Parnell, of Indiana, Pennsylvania;
First National Bank of Indiana, Pennsylvania; and
Federal Reserve Bank of Cleveland, Ohio, with a branch office in the City of Pittsburgh, Pennsylvania (12a).

The Complaint charges *each* of said defendants *separately* with having *converted*, on September 28, 1948 and October 25, 1948 respectively, the two lots of Home Owners' Loan Corporation bonds as described in the Complaint as the property of plaintiff (13a, 14a), of the value of $57,600.00. *The Complaint contains no allegation of conspiracy*, nor is there any evidence or indication thereof.

The case was dismissed against the Federal Reserve Bank of Cleveland on motion based on Federal Law and Treasury Regulations at the conclusion of plaintiff's case in chief (285a, 300a and 413a). At the same time at the conclusion of plaintiff's case in chief a motion in behalf of First National Bank in Indiana for dismissal was made and refused (262a, 300a) and renewed at the conclusion of the case (413a). The jury rendered three *separate verdicts* against each of the three defendants for the full principal amount of plaintiff's claim, namely $57,600.00 each, allowing no interest (439a).

The bonds in question were all issued under *Act of Congress approved April 27, 1934, were at all relevant times negotiable, payable to bearer, guaranteed by the United States Government* and subject to call on or after May 1,

1944 (see Exhibit 1-A, specimen copy of bonds 449a and plaintiff's Answer to Defendant Bank's Request for Admissions, 28a). The bonds had been called for redemption on or about May 1 or 2, 1944 (64a).

All of the bonds in this case with other securities disappeared from plaintiff's banking place of business, San Francisco, California on May 2, 1944 (the story of this disappearance appears in testimony of Miss Britton, 59a to 71a).

The first lot of bonds described in the Complaint in the condition received (13a) were placed in the hands of defendant bank on September 28, 1948 for redemption or collection by Gilbert S. Parnell, an attorney, a depositor of the bank and also a director, without defendant bank having any notice of defect or infirmity. (See Plaintiff's Answer to Defendant Bank's Request for Admissions (b), 28a and testimony of cashier of defendant bank 339a to 341a, inclusive). This lot of bonds was sent, on September 28, 1948 by letter signed by T. Edgar Walker, Assistant Cashier of defendant bank, to the Pittsburgh Branch of Federal Reserve Bank of Cleveland for redemption (letter Exhibit 1, 20a). Pittsburgh Branch of Federal Reserve Bank credited the proceeds of redemption on September 30, 1948 of this first lot of bonds to First National Bank in Indiana, Pa. in the sum of $19,600.00 (Ex. 2, 21a). First National Bank in Indiana, on October 1, 1948 paid by cashier's check signed by T. Edgar Walker, Assistant Cashier, to the order of Gilbert S. Parnell, attorney at law, the sum of $19,590.00, $10.00 having been deducted as the bank's expenses (see Ex. 3, 22a, also record 332a to 334a inclusive).

The second lot of bonds as described in the Complaint in the condition received (14a) were likewise placed in the hands of defendant bank on October 25, 1948 by Gilbert S.

Parnell, an attorney, a depositor and also a director of defendant bank, without notice of defect or infirmity, for redemption or collection (30a and 341a to 342a, inclusive). This second lot of bonds were sent, on October 25, 1948 by letter signed by T. Edgar Walker, Assistant Cashier, to the Pittsburgh Branch of the Federal Reserve Bank of Cleveland for redemption (see Ex. 22a). The Pittsburgh Branch of Federal Reserve Bank credited the proceeds of the redemption on October 26, 1948 of this second lot of bonds to the First National Bank in Indiana in the sum of $38,000.00 (Ex. 5, 23a). The First National Bank in Indiana, on October 28, 1948 paid by cashier's check signed by T. Edgar Walker, Assistant Cashier of defendant bank to the order of Gilbert S. Parnell, attorney, $37,980.00, being the sum credited less $20.00 as costs and expenses (see Ex. 6, 24a, also record 335a to and inclusive of 336a).

The defendant, First National Bank in Indiana, has its place of business in a small town of approximately 10,000 population (338a) in which no brokerage house is located (362a).

In the trial of this case Plaintiff's Exhibits 7 to 10 inclusive were read as evidence "against all defendants" over defendant's objections in behalf of defendant bank as appears in the record 93a-148a. There was no evidence that the contents of any of these exhibits ever reached defendant bank.

Exhibit 7—Letter from Federal Reserve Bank of San Francisco to *Federal Reserve Bank of Cleveland dated May 5, 1944* (93a, read in record page 98a).

Exhibit 8—Letter from Bank of America to *Federal Reserve Bank of Cleveland dated May 9, 1944* (99a, read in the record pages 100a, 101a, 102a).

Exhibit 9—Letter from Treasury Department of United States to Mr. Fleming, *Federal Reserve Bank of Cleveland* dated May 15, 1944 (104a, read into the record pages 108a to 111a inclusive, to which letter was attached two other letters).

Exhibit 10—Mimeograph form notice (photostatic copy) from files of Federal Reserve Bank (114a). Introduction of this exhibit was continuously objected to by defendant. (Limited stipulation 249a and 250a did not bear on this objection.)

Notwithstanding objection, Exhibit 10 was introduced, read and shown to jury (251a).

Plaintiff offered in evidence Paragraph 7 of defendant bank's Answer, together with all sub-paragraphs (b) to (e) inclusive (158a to 164a) and Paragraph 11, including sub-paragraphs (g) to (j) inclusive (165a to 168a) and defendant bank's exhibits attached to the Answer numbered 1 to 6 inclusive. This record of defendant's Answer shows that on September 28th and October 25th of 1948 respectively the two lots of bonds were delivered by Gilbert S. Parnell to defendant bank for redemption; that said lots of bonds were redeemed by defendant bank through the Pittsburgh Branch of Federal Reserve Bank of Cleveland, and that on October 1, 1948 defendant bank paid by cashier's check to Gilbert S. Parnell, attorney, $19,600 less $10.00 expenses, being the proceeds of the first lot of bonds, and on October 28, 1948 paid to said Gilbert S. Parnell, attorney, by cashier's check the sum of $38,000 less $20.00 expenses.

Defendant, First National Bank in Indiana, offered in evidence the Answer of plaintiff to defendant's Request

for Admissions by Plaintiff (322a to 336a inclusive) which shows the identical facts as offered by plaintiff (157a, 171a). These Answers by plaintiff to defendant's Request show that the two lots of bonds payable to bearer were redeemed by defendant bank in the regular course of business and the proceeds, less expenses, were paid by cashier's check to Gilbert S. Parnell, attorney, who had left the bonds with defendant bank for redemption (25a to 30a inclusive).

The case was submitted *to the jury as if separate actions had been brought against each of the different defendants* (429a). The jury returned three separate verdicts for the full principal amount of plaintiff's claim, without interest, on October 15, 1954 (439a), and on said date, October 15, 1954, separate judgments were entered against Arthur A. Rocco for $57,600, against Gilbert S. Parnell for $57,600, and against the First National Bank in Indiana for $57,600 (9a).

On October 22, 1954, in behalf of First National Bank in Indiana a motion was filed to set aside the judgment entered on the verdict under Rule 50 (b) of Federal Rules of Civil Procedure and for a new trial (440a). On November 16, 1954 defendant bank's motion to set aside the judgment and for a new trial were refused by the Court (447a). From this judgment against First National Bank in Indiana an appeal was taken to the United States Court of Appeals.

This appeal to the United States Court of Appeals was argued April 19, 1955 before three judges, namely Goodrich, McLaughlin and Staley, J. J. The Court, *of its own volition*, ordered a reargument, which took place June 6, 1955 before the Court *en banc*, consisting of Biggs, P. J., Maris, Goodrich, McLaughlin, Kalodner, Staley and Hastie,

J. J. The majority decision October 12, 1955 by Biggs, P. J., Maris, Staley and Hastie reversed the decision of the District Court and directed judgment to be entered in favor of defendant First National Bank in Indiana.

Summary of Argument

I.

Regardless of the specific substantive law which controls the outcome of the case, the subject matter of this case concerns Home Owners' Loan Corporation bonds, issued under Act of Congress authorizing Treasury Regulations, and payable to bearer.

The bonds were unconditionally guaranteed by the United States Government, both as to principal and interest. Under the Act of Congress, the United States Treasury Department had authority to issue and did issue Treasury Regulations which provided for presentation, surrender and payment thereof. This Treasury Regulation provided that, upon appropriate request, a Federal Reserve Bank may make payment to a member bank by crediting the amount to the member bank's account. Defendant bank was and still is a member bank of Federal Reserve System.

II.

The bonds in question were placed in the hands of defendant bank for redemption or collection and were sent in the condition received by registered letter signed by the Assistant Cashier, to the Pittsburgh Branch of Federal Reserve Bank of Cleveland, and the proceeds deposited to the credit of First National Bank in Indiana, the defendant, and on the same day received, paid to its customer

less $10.00 as registration and insurance expense on one lot of bonds and $20.00 on the other one. These facts are shown by Exhibits 1 to 6 inclusive, pages 20a to 24a of the Record.

It is our position defendant bank never owned or had title to the bonds in question. It was merely the transfer agent or conduit (Grantal vs. National Surety, 254 N. Y. 483, 173 N. E. 682, First National Bank of Blairstown vs. Goldberg, 340 Pa. 337 at page 343) in sending the bonds for redemption or collection. It never paid any consideration for them and it only realized $10.00 as an expense for its services in one instance and $20.00 in the other. The bonds having been sent for collection or redemption in the condition received, the fact that they had inoperative coupons attached, so far as this defendant is concerned was entirely immaterial. Plaintiff petitioner failed to prove as against defendant bank, notice or knowledge of defect or infirmity in the bonds. The Negotiable Instruments Law has no application whatever to the uncontroverted facts in this case and the attempt to apply it does nothing except to create confusion. Under the facts in this case defendant bank cannot legally be held to be a converter of the bonds, and this is true both under Federal Law or the laws of the Commonwealth of Pennsylvania.

The following are federal cases in support of the foregoing position:

Clearfield Trust Co. v. U. S., 318 U. S. 63 (1943).
National Metropolitan Bank v. U. S., 323 U. S. 454 (1945).
U. S. v. Birdsall, 233 U. S. 223 (1914).
U. S. v. Janowitz, 257 U. S. 42 (1921).
Murray v. Lardner, 69 U. S. 110 (1864).
Hotchkiss v. National Bank, 88 U. S. 354 (1874).
Morgan v. U. S., 113 U. S. 476 (1865).

III.

Federal Law and Treasury Regulations are applicable to the instant case. They determine the fact that the bonds are bearer bonds, irrespective of the fact of their having been called prior to their due date and had inoperative coupons attached, and that their method of payment is provided for by Treasury Regulations issued by the authority of the Act of Congress under which the bonds were issued. Federal Law and Treasury Regulations are particularly applicable to the instant case since the redemption or collection by defendant bank was in strict compliance with the Treasury Regulation in that defendant bank sent by registered letter, the bonds to Federal Reserve Bank requesting payment, and as provided by said Treasury Regulation, the Federal Reserve Bank made payment by depositing the proceeds to the credit of defendant bank, a member bank of the Federal Reserve System.

IV.

It has been our position throughout in this case that the burden of proof of bad faith concerning United States bearer bonds rests on him who asserts it. This position has been upheld in this case by the majority ruling of United States Court of Appeals. This burden of proof rule has been upheld not only by our Federal courts, but also by Pennsylvania courts (First National Bank of Blairstown vs. Goldberg, *et al.*, 340 Pa. 337, particularly at page 343) and was followed by the Court of Appeals of New York State in the case of Gruntal, *et al.* vs. National Surety Corp., 254 N. Y. 483 (173 N. E. 682, 73 A. L. R. 1337).

The record in this case fails to show proof of notice of defect or infirmity of the bonds so far as defendant bank

was concerned. Plaintiff undertook to prove notice by introducing certain exhibits (7, 8, 9 and 10) but Goodrich, J. in his dissenting opinion (515) concedes, "It is not claimed that any of these (Exhibits 7, 8, 9 and 10) reached the Indiana Bank so as to charge it with knowledge these notices contained."

It is our contention that State Negotiable Instrument Law has no application to the uncontroverted facts in the instant case.

The securities in question have their origin in the Act of Congress which authorizes Treasury Regulations concerning, among other things, the method of payment by request on the Federal Reserve Bank from a member bank of its system. Defendant bank, as a member bank of the Federal System, requested redemption or payment as provided by Treasury Regulation in strict accordance therewith. The proceeds were deposited to the credit of defendant bank and paid by its Assistant Cashier's check to its customer, less a small expense of $10.00 in one instance and $20.00 in the other.

To undertake to place defendant bank in the position of a "holder" or "purchaser" of these bonds and apply the local Negotiable Instruments Law as if defendant bank was such holder or purchaser, is entirely without merit.

V.

The petitioner, plaintiff, undertook to prove notice to defendant bank of defect or infirmity in the bonds by use of Exhibits 7, 8, 9 and 10, which are referred to in our Statement of the Case. They were offered in evidence and read to the jury against all of the defendants, on the assumption that proof of their contents would be "brought home to defendants". When plaintiff failed to prove that

knowledge of these exhibits had reached defendant bank, a motion was made to strike them from the record with instructions to the jury to disregard them. This, however, was refused by the Court.

The question of the admission of these exhibits was raised in the United States Court of Appeals, but that Court held so far as defendant bank was concerned, it was unnecessary to consider the question of their admission. Should this Honorable Court conclude as did the Third Circuit Court of Appeals, it will find it unnecessary to consider these exhibits. However, it is our contention their admission was clear error and they should have been stricken from the record with proper instructions to the jury.

ARGUMENT

I

Facts concerning subject matter, Acts of Congress and Treasury Regulations.

The subject matter of this case is Home Owners Loan Corporation bonds payable to bearer. They were issued under the Act of Congress which is known as the "Home Owners Loan Act of 1933" Title 12 U. S. C. A. Sec. 1461 *et seq.* as amended and approved by the Act of April 27, 1934. They had been called but were not yet due. The bonds include the following provisions:

> "The Corporation will pay principal and interest when due, at the Treasury Department, Washington, D. C. or at any government agency in the United States which the Secretary of the Treasury may from time to time designate for the purpose."

All of the bonds were fully and unconditionally guaranteed by the United States of America (Ex.1-A, specimen

form of bond, 449a). The Act of Congress which authorized the issuance of the H. O. L. C. bonds in question contains the following language:

> "Such bonds shall be in such forms and denominations, shall mature within such periods of not more than eighteen years from the date of their issue, shall bear such rates of interest not exceeding 4 per centum per annum, shall be subject to such terms and conditions, and shall be issued in such manner and sold at such prices as may be prescribed by the Corporation, with the approval of the Secretary of the Treasury. Such bonds shall be fully and unconditionally guaranteed both as to interest and principal by the United States * * *." 12 U. S. C. A. Sec. 1463 (c).

This Act has not been repealed or modified. Section 8 of Public Law No. 178, 73rd Congress, approved April 27, 1934, authorized Federal Reserve Banks to act as fiscal agents of the H. O. L. C., in the following language:

> "The Federal Reserve banks are authorized, with the approval of the Secretary of the Treasury, to act as depositaries, custodians, and fiscal agents for the Home Owners' Loan Corporation." 12 U. S. C. A. Sec. 394. Act of Apr. 27, 1934, 48 Stat. 646.

Under the foregoing Acts of Congress a Treasury Regulation, being Treasury Department Circular No. 666, 6 Fed. Register 3726, 31 Code of Fed. Regulations Sec. 307.5 @ p. 396 was issued in 1941 which provides in regard to presentation, surrender and payment of United States bearer securities, among other things as follows:

> "Coupon bonds, notes, certificates of indebtedness, Treasury bills, and other bearer securities which have become due and payable, whether at maturity or by virtue of a call for redemption before maturity, are payable in due course *to the person presenting and surrendering them for redemption, or to such person as he may designate.*
>
> * * *

> A Federal Reserve Bank, upon appropriate request, may make payment to a member bank from which bearer securities are received *by crediting the amount in the member bank's account.*" (Emphasis supplied.)

Defendant First National Bank in Indiana was and still is a member bank of Federal Reserve System (289a).

II

Under the admitted, uncontroverted facts in this case, defendant bank is not liable for conversion.

Plaintiff, throughout in the trial of this case, has *erroneously* insisted on placing defendant bank in the legal position of a "holder" or "purchaser" of the bonds in question, and in failing to apply the facts applicable to the defendant bank separately and independently of the other defendants.

It is important in this, as in every case, to have a clear knowledge and understanding of the facts. *What now are the facts applicable to defendant bank?* In order to get them accurately before the Court we respectfully request this Honorable Court to read Exhibits 1 to 6 inclusive, as they appear in the record pages 20a to 24a. These exhibits were read into the record by plaintiff as admissions taken from defendant bank's Answer (158a to 171a). They were read into the record as admissions by defendant based on plaintiff's Answer to Defendant's Requests for Admissions (see Defendant's Request for Admissions, 25a, Plaintiff's Answer to Requests, 28a, and as read in the record for defendant bank, 322a to 336a). A plain[redacted] statement of the facts based on these exhibits is that these bonds were placed in the hands of defendant bank for redemption or collection, not as a "holder" or "purchaser". Defendant bank never owned or had title to the bonds. *No consideration whatever was paid for them by defendant bank.*

They were sent by mail *in the condition received by it* to the Pittsburgh Branch of the Federal Reserve Bank of Cleveland for redemption or collection. It will be noted that T. Edgar Walker, Assistant Cashier of defendant bank who issued the checks in payment and the transmittal letters (20a, 22a, 24a Record), died before the time of trial and could not be called as a witness (341a Record). The proceeds of their redemption or collection was placed to the credit of the First National Bank in Indiana by the Federal Reserve Bank (21a, 23a Record) and paid out by defendant bank's cashier's check less an expense item for registration and insurance, $10.00 for one lot of the bonds and $20.00 for the other lot. Contrary to statement and inferences given in Petitioner-Appellant's statement of facts, the evidence of the defendant First National Bank in Indiana was clear and unequivocal and in no way conflicting. The evidence supports the facts as here stated. It must always be borne in mind that the case of the First National Bank in Indiana must be considered upon its own facts and not merged in statements of conclusion as to all defendants as is done by petitioner. Defendant bank never was a holder or purchaser in due course as claimed by plaintiff. It was nothing more than a collecting agent or representative. These uncontradicted facts show defendant bank never even claimed to be a "holder" or "purchaser" of the bonds in due course. Therefore no liability as a holder in due course or purchaser could attach to defendant bank since it never was such holder or purchaser, and there could be no conversion. Black's Law Dictionary, page 430, defines "conversion" as follows:

> "Conversion is an unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of the owner's rights."

Restatement of American Law Institute on Agency, Section 349 (g) states:

> "Thus, if an agent sells, on account of his principal, a negotiable instrument, the holder of which has the power to pass title, the agent does not commit conversion if he sells such instrument without notice of the rights of the person entitled to possession, although his principal is not a *bona fide* holder of the instrument."

The defendant bank's position in this case is no different than it would be in any case where bonds of any kind, coupons or other items were left with it for collection. If the majority opinion of the Court in this case is not upheld, no bank would ever be safe in accepting from its customers any securities of any kind whatever *for collection* because of the added responsibility of unavailable trial proof placed upon them if questioned, despite absolute good faith. There would thus then be a serious impediment placed upon the process of redemption of United States Government Securities, and in the interest of public policy in this regard, the decision of the majority should prevail.

* *Overdue bonds have to be collected.* How can they be collected if there is a rule of law which raises a red flag of warning that they may have been stolen? (footnote 1)

It is a fact here to be noted that plaintiff undertook to prove notice of defect or infirmity by use of Exhibits 7, 8, 9 and 10 referred to in our statement of the case, which exhibits we will later discuss in our argument. But even the dissenting opinion written by Goodrich, J. regarding these

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(Footnote 1) Report of the Secretary of the Treasury for the year 1947 @ p. 334 shows: Summary of Public Debt and Guaranteed Obligations Outstanding June 30, 1947—Matured debt on which interest has ceased $230,913,535.76; and guaranteed obligations—Matured debt on which interest has ceased $6,307,900.00 @ p 349, classification of the above debt includes "Old debt matured—issued prior to Apr. 1, 1917, Postal Savings bonds, Liberty bonds, Victory notes, Treasury bonds, H. O. L. C. bonds, etc."

exhibits concedes "It is not claimed that any of these reached the Indiana Bank so as to charge it with knowledge which these notices contained" (515).

Based on the foregoing facts we respectfully submit this case is entirely outside the section of Negotiable Instrument Law cited by appellants for two reasons: first, the bonds were issued under Act of Congress, guaranteed by the United States Government and therefore fall under the exception to the Conformity Act and are controlled by Federal Law (discussed fully in following Subhead III); and second, the facts show defendant bank had no other interest in the bonds except to forward them on for redemption or collection and never was or claimed to be a holder for value, or purchaser, under either Pennsylvania or Federal Law.

We further state the fact that the bonds had been called, had inoperative coupons attached, were past due or not due until the date of their maturity, was wholly immaterial as far as defendant bank is concerned. It sent the bonds *in the condition received* to the proper place for redemption or collection and as collection items, payment was made to its customer. Under these admitted uncontroverted facts defendant bank could not legally be held to be a converter. There is no need to confuse the issue in this case by charging defendant bank as a holder or purchaser of these bonds as negotiable instruments when the facts, admitted and offered by both plaintiff and defendant bank, show otherwise. The following authorities all support the above stated position:

Gruntal *et al.* v. National Surety Corp., 254 N. Y. 483 (173 N. E. 682, 73 ALR 1337).

Morgan v. United States, 113 U. S. 476.

Hotchkiss vs. National Bank, 88 U. S. 354.

Listie Coal Co. v. Farmers National Bank, 287 Pa. 337.

First National Bank of Blairstown v. Goldberg *et al.*, 340 Pa. 337 and particularly at page 343.

The dissenting opinion completely misapprehends the actual facts in this case. In the dissenting opinion, page 510, is stated the following:

> "It (defendant bank) was a "holder" of the paper because it was in possession of an instrument payable to bearer."

(Cited in footnote is Pa. Negotiable Instruments Law as authority.) This statement entirely disregards the facts, and the authority given a member bank of the Federal Reserve System under the U. S. Treasury Regulation heretofore referred to to present bonds as in the instant case for collection. Defendant bank under the facts in this case and U. S. Treasury Regulation never was in any conceivable sense a legal "holder" of the bonds in question. To hold it was such legal holder would place every member bank of the Federal Reserve System in a position never to be able to accept any U. S. Government securities payable to bearer for collection with safety. Further, the mysterious circumstances under which the bonds dissappeared from inside the Plaintiff Bank (61a *et seq.*), combined with the good faith of the Defendant Bank bring into play the familiar maxim that as between two innocent parties, the one who brings about a loss should bear it. See Sherwood Distilling Co. vs. People's First National Bank & Trust Co., 193 Fed. 2nd 649; and Gimbel Bros vs. Hymowitz, 160 Pa. S. C. 327, 330.

III

Applicable Federal Law and Treasury Regulations.

We submit it is beyond question that these are *bearer bonds,* for the bonds themselves so state (Plaintiff's Ex. 1-A, 449a). The fact that the bonds had been called did not change their legal status in this respect. The case of *Morgan vs. United States,* 113 U. S. 476 (1865), is an important authority on this point. We quote the following excerpts from the opinion of this case applicable to the instant case:

P. 498

> "The legal effect of the call undoubtedly is to entitle the holder to demand payment at its maturity, and, even though not demanded, to exonerate the government from liability for interest accruing after that date; but, consistently with the terms of the statutes and the obvious purposes in view in the original creation and issue of the securities in the form adopted, it cannot be, that the legal effect of such a call for the purpose of redemption is the same as if the bond had been originally framed as an obligation to pay absolutely on a day previously fixed."

* * *

P. 499

> "*and in that form, it seems to us quite plain that it could not be considered an overdue obligation, in the sense in which that term is applied to ordinary commercial paper, until after the limit fixed for final payment had been passed.*" (Emphasis ours)

* * *

P. 500

> "for, as we have already shown, the only change in the original effect of the contract by the exercise of the right of earlier redemption is to stop the obligation to pay future interest. And as against one choosing for any purpose of his own to retain his bond as a

> continuing security for the value it always represents, having impressed upon it by the law of its creation the faculty of passing from hand to hand as money, and therefore just as useful in the pursuits of trade and the exchanges of commerce and banking as so much money in the form of coin or bank notes, and more convenient because more portable, no such presumption can be entertained on the ground that its continued circulation is not in the due course of business, that it has fully performed all its intended functions, and that it has been in any sense dishonored by a refusal on the part of the obligor to fulfill its obligations."

This statement of law as made by the United States Supreme Court, as we have quoted herein, is still the law, and therefore the fact that the bonds in question had been called did not change their legal effect or status as bearer bonds.

Our Pennsylvania State Supreme Court has held to this rule, citing this Morgan case and other authorities. We refer to *Listie Coal Co. vs. Farmer's National Bank*, 287 Pa. 337 (1926), which states that past due coupons for four and a half years attached to bonds were not notice (at page 342). The time element, whether it be months or years, can be of no import, particularly in the case of a broker or bank transmitting for collection or redemption. Even the *ex post facto* Uniform Commercial Code (enacted in Pennsylvania in 1953 and in no other state) at Section 8-305 to which petitioner, plaintiff refers, is limited to a "purchase" and judiciously does not apply to transfer agents. Treasury Department Regulations direct that such coupons be left attached to the securities: *Treasury Dept. Regulations Circular #666*, 6 Fed. Register 3726, 31 Code of Fed. Regulations Sec. 307.5 at page 396:

> "* * * All coupons bearing date subsequent to a redemption date should be left attached to the securities."

It was our contention in the trial, and still is, that since the bonds were payable to bearer, were issued under the Acts of Congress which authorized Treasury Regulations regarding surrender, redemption and payment, which Treasury Regulations are judicially recognized by our Federal Courts (*U. S. vs. Birdsall*, 233 U. S. 223, and *U. S. vs. Janowitz*, 257 U. S. 42), the decisions of the Federal Court are applicable.

It should be noted that the Trial Court in this action dismissed the case as to the Federal Reserve Bank of Cleveland at the close of plaintiff's case in chief (See Record 285a to 300a).

Defendant First National Bank in Indiana, at the close of plaintiff's case in chief, moved for dismissal of its case (262a), stating the reasons therefor and again, after plaintiff had reopened its case and closed, renewed said motion to dismiss which was refused (300a).

That Federal Law is applicable in this case, we cite the case of *Clearfield Trust Company vs. U. S.*, 318 U. S. 363 (1942). In this case on page 366 the Court, in its opinion, states as follows:

> "We agree with the Circuit Court of Appeals that the rule of Erie R. Co. v. Tompkins, 304 U. S. 64, does not apply to this action. The rights and duties of the United States on Commercial paper which it issues are governed by federal rather than local law.
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> • • •
>
> The issuance of commercial paper by the United States is on a vast scale and transactions in that paper from issuance to payment will commonly occur in several states. The application of state law, even without the conflict of laws rules of the forum, would subject the rights and duties of the United States to exceptional uncertainty. It would lead to great diversity in results by making identical transactions subject to the vagaries of the law of the several states. The desirability of a uniform rule is plain."

The majority decision of the Third Circuit in this case followed this ruling, clearly indicating the disastrous results if "the several and diverse laws of the states" were to control (see opinion page 498). Further, the Uniform Negotiable Instruments Law falls far short of attaining specific uniformity of result in each instance. The many changes applied by the various states in various instances (Pennsylvania having repealed it entirely) overcome uniformity in any specific instance. So long as there remains state freedom to legislate, the great value of the Negotiable Instruments Law or any other uniform code is the value to general purpose, not to specific instance. Unless and until absolute uniformity of any law such as this is attained, its advocacy in this regard is valuless because one variance in a specific instance nullifies its use.

In further support of our position as herein stated that Federal Law is applicable, we refer to these additional cases:

U. S. vs. Birdsall, 233 U. S. 223.

U. S. vs. Janowitz, 257 U. S. 42.

U. S. vs. Dolphin Deposit Trust Co. et al., 50 F. Supp. 73 Middle District of Pa.

The following is taken from the opinion of this Middle District case, page 75:

> "Because the Federal Government is a party to the contract this is a Federal contract which is necessarily controlled by the Federal law. It is based upon the exercise of the power delegated to Congress to borrow money on the credit of the United States. Erie R. Co. v. Tompkins, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A. L. R. 1487, does not apply. The borrowing power necessarily includes the power to fix the terms of the Government's obligations. Legal Tender Case, 110 U. S. 421, 48 S. Ct. 122, 28 L. Ed. 204. The Treasury regulations are within the authority given the Secretary of the Treasury by the Congress and have the force of Federal law. United States vs. Bird-

sall, 233 U. S. 223, 34 S. Ct. 512, 58 L. Ed. 930; United States vs. Janowitz, 257 U. S. 42, 42 S. Ct. 40, 66 L. Ed. 120.

"Rules and regulations prescribed by administrative bodies and officers and which are adopted pursuant to authority of an act of Congress, so long as they are reasonably adapted to the enforcement of the act, and are not in conflict with express statutory provisions, have the force and effect of law, Maryland Casualty Co. vs. United States, 251 U. S. 342, at page 349, 40 S. Ct. 155, 64 L. Ed. 297."

We refer to Beutel's Brannan on Negotiable Instruments Law, 7th Edition, page 108, where under the heading "Cases Where Federal Law Applies" is stated:

"There is a well established field outside of the Conformity Act where the Federal Courts have never felt themselves bound to follow State statutes. The Conformity Act itself simply says:

'The laws of the several states, except where the constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decisions in trials at common law, in Courts of the United States in cases where they apply.'

In all of those situations where Federal Courts, or for that matter State Courts, deal with paper issued by the federal government or agencies created under Federal constitution and statutes, the cases lie outside the field of the Conformity Act, and the law in such cases flows from the Constitution, the Federal statutes, delegated legislation in the form of departmental rules and orders, and sometimes from decisions of quasi judicial administrative agencies. These taken as a whole may establish a set of rules completely different from those codified in the Negotiable Instruments Law, which has not been adopted by the Congress as a Federal law.

"Where all of the above sources are silent, the Federal Courts have consistently held that although state decisions and interpretations of the Negotiable Instruments Law may be evidence of the general Federal law involved, they are not binding on Federal

Courts and they may decide cases on what they believe to be the rules of justice of the particular facts."

The Conformity Act of Congress here referred to was passed Sept. 24, 1789 and is found in U. S. Statutes at Large, Vol. 1, Page 92. It was re-enacted June 24, 1948 making a change of the words "trial at common law" to "civil actions" and is found as re-enacted in Title 28 U. S. C. A Section 1652. (For copy as amended see Appendix of this Brief.)

We further quote from Beutel's Brannan, the following:

"Thus there is a large and growing field of negotiable instruments wholly outside the Negotiable Instruments Law, and rules of uniformity which it intends to set up. Until Congress adopts the Act, this situation may be expected to continue. The Negotiable Instruments Law is, of course, part of the Code of the District of Columbia (Laws of 1899 U. S. Stat. C. 47) and governs transactions in that area. However, it has not seemed to have been applied to government business originating there and probably was not intended to so apply. Even if the Negotiable Instruments Law or a similar uniform statute were to be adopted for the Federal Government to cover federal business and control interstate commerce and other fields where Federal Law carries procedure, there would still remain the problem of reconciling results with other federal statutes and agency rulings given under proper delegation of authority. These, of course, would tend to perfect uniformity of results with cases dealing only with private commercial paper."

Goodrich on Conflict of Laws, page 44, makes the following statement:

"There remains another phase of this general problem which must not be overlooked. The law of Erie Railroad Company v. Tompkins pertains only to litigation in federal courts by virtue of the diversity of the citizenship of the parties and invoking state created rights.

> Where an action is in the federal court on some other jurisdiction basis, or *involves rights created by federal law, federal facts or policies, the doctrine of Erie vs. Tompkins does not apply.*" (Emphasis ours.)

In the footnotes it states the following: Halmberg v. Ambrecht, 327 U. S. 392, U. S. v. Standard Oil Co. of California, 332 U. S. 301, 1946, 59 Harvard Law Review, 966.

The following is an excerpt taken from this Harvard Law Review, page 970, regarding the Clearfield case:

> "* * * there are particularly strong reasons for applying the federal rule. In its issuance of commercial paper the United States engages in many transactions over a wide area. Under such circumstances a uniform rule, to be applied wherever a case arises, makes for simplicity and certainty. Thus this apparent exception to the Erie vs. Tompkins case does not in fact violate its fundamental tenet—uniformity of decision between state and federal court."

The following is also an excerpt taken from page 975 of this Harvard Law Review regarding the holder of U. S. war bonds:

> "Although the United States in substance is only a stake holder in the controversy its interest in promoting the sale of bonds is advanced by upholding their terms uniformly throughout the country, a result Congress presumably intended."

The authorities all recognize the Federal law in cases where rights, duties or liabilities of the parties are founded in the constitution, treaties or statutes of the United States. The case of U. S. v. Allegheny County, 322 U. S. 174 (1944) states this principle with a long list of authorities. We quote therefrom as follows:

> "Procurement policies so settled under federal authority, may not be defeated or limited by state law. The purpose of the supremacy clause was to avoid the introduction of disparities, confusions, and conflicts which would follow if Government's general authority

were subjected to local contracts. The validity and construction of contracts through which the United States is exercising its constitutional powers, their consequences or rights or obligations of parties, the title or liens which create or permit, all present questions of federal law not controlled by the law of any state. Clearfield Trust Company vs. U. S., 318 U. S. 363; Jackson Company vs. United States, 308 U. S. 343; Carpenter vs. Shaw, 280 U. S. 363; Utah Power and Light Co. vs. United States, 243 U. S. 389; U. S. vs. Ansonia Brass and Copper Co., 218 U. S. 452; D'Oench, Dulme and Co. vs. Federal Deposit Insurance Co., 315 U. S. 447; Dietrick vs. Greaney, 309 U. S. 190; Federal Land Bank vs. Bismark Lumber Co., 314 U. S. 329."

By analogy we add the following authorities:

Huser et al. vs. Woodruff et al., 327 U. S. 726, 732 (1946);

Holmberg et al. vs. Armbrecht, 327 U. S. 392, 395 (1946);

U. S. vs. Standard Oil Co., 332 U. S. 301.

This case of Holmberg *et al.* vs. Armbrecht involved a question of Statute of Limitations. In the opinion by Mr. Justice Frankfurter, page 395, is stated the following:

"We do not have the duty of a federal court, sitting as it were as a court of a state, to approximate as closely as may be to state law, in order to vindicate without discrimination a right derived solely from a state. We have the duty of federal courts, sitting as national courts throughout the country, to apply their own principles in enforcing an equitable right created by Congress. When Congress leaves to the federal courts the formulation of remedial details, it can hardly expect them to break with historic principles in equity the enforcement of federally-created equitable rights."

The case of U. S. vs. Standard Oil Co. *supra*, was an action for an injury to a soldier of the United States Army.

The opinion was delivered by Mr. Justice Rutledge, concurred in by Mr. Justice Frankfurter. After a discussion of both the rule of Erie Railroad Company vs. Tompkins and the Clearfield case, it was held as stated in the syllabus as follows:

> "The decision is not governed by state law where the injury occurred, but by federal law, even though Congress has not acted affirmatively concerning the specific question."

On page 305 the Court states:

> "Although the Clearfield case applied these principles to a situation involving contractual relations of the Government, they are equally applicable in the facts in this case where the relations affected are non-contractual or tortious in character."

Home Owners' Loan Corporation bonds have their origin in the Act of Congress which authorized Treasury Regulations to be made regarding surrender, redemption and payment. The Treasury Regulations authorized payment to be made to a member bank of the Federal Reserve System. Defendant bank was and still is a member bank of Federal Reserve System. Redemption of the bonds in question was made in strict accordance with these Federal Regulations.

IV

Burden of proof was on plaintiff.

Many of the authorities under our previous heading support the statement that plaintiff must carry the burden of proof of a charge of bad faith. What now is the law on this question? We will start with the early case of Murray vs. Lardner, 69 U. S. 110 (1864). This case involved Ambory Railroad Company bonds, payable to bearer, which had been stolen. The Court, on page 121 in this case, states:

> "Suspicion of defect or knowledge of circumstances which would excite such suspicion in the mind of a prudent man, gross negligence on the part of the taker at the time of the transfer will not defeat his title. The result can be produced only by bad faith on his part. *The burden of proof lies on the person who assails the right claimed by the party in possession.*" (Emphasis supplied.)

It is to be here noted that the bonds in this case are not United States Government bonds and yet it was specifically held that the burden of proof was on plaintiff to prove, by competent evidence, bad faith.

The following cases all hold to the same effect on the question of the burden of proof:

Texas vs. White, 74 U. S. 700, 735 (1868). Opinion by Chief Justice Salmon P. Chase;

Presidio Co. vs. Nail-Young Bond and Stock Co., 212 U. S. 58 (1908). The opinion in this case was by Mr. Justice Harlan, citing Murray vs. Lardner and many other authorities;

Marine National Exchange Bank of Milwaukee *et al.* vs. Kalt, Zimmers Manfacturing Co., 293 U. S. 357, 364 (1934). The opinion in this case was by Mr. Justice Cardozo;

Graham vs. White-Phillips Co., Inc., 296 U. S. 27, 32 (1935). The opinion in this case was by Mr. Justice Reynolds.

This last case (Graham vs. White-Phillips) originated in the State of Michigan and was transferred to the Federal Court. The Michigan court rule on burden of proof was in accord with that of the Federal rule. The opinion, page 32, so states that the Michigan rule "accords with what this court said in the Goodman case, 20 Howard 343-365, 366 and 367; Murray vs. Lardner, 2 Wall 110" and other authorities, concluding with the statement, "It accords with 'the view long enforced in England' ".

The Court of Appeals of New York State followed the federal rule in the case of Gruntal *et al.* vs. National Surety Corp., 254 N. Y. 483 (173 N. E. 682, 73 A. L. R. 1337). We here quote at length from this New York State case as follows:

"United States government bonds, payable to bearer, and like bonds of corporations, circulate today as freely as money; title passes by delivery. A broker accepting such securities for disposition on behalf of a customer has little or no means of warning or inquiry such as indorsements or other relationships might suggest. The securities pass from hand to hand by delivery. *He is a mere conduit between the seller and the purchaser, for which he receives a small commission.* The purchaser is not liable for conversion yet the broker, acting without any ground for suspicion, is said to be liable for the full value of the security which he has sold, although he has paid the purchase money over to the seller. The harshness of such a rule has been recognized by the courts in repudiating his liability. *Public policy does not demand the extension* of liability for innocent acts to such a case. In Pratt vs. Higginson, 230 Mass. 256, 257, 119 N. E. 661, 662, 1 A. R. L. 714, the Supreme Judicial Court of Massachusetts said of brokers:

"The question for decision therefore is whether the defendants who received and sold the bonds and accounted for the proceeds to the apparent owner, without notice of any infirmity in the title, or of any circumstances which should have put them upon inquiry, can be held responsible in damages by the true owner for conversion.

'The defendants undoubtedly exercised dominion over the bonds by converting them into money. If the property had consisted of chattels or non-negotiable documents of which certificates of stock are an example, the plaintiff's title would not have been divested by a sale even to a purchaser for value and in good faith. Scollans vs. Rollins, 173 Mass. 275, 278, 53 N. E. 863, 73 Am. St. Rep. 284, and cases there collected. *But to this rule there is a well recognized*

exception where the property consists of negotiable securities.' (Emphasis supplied.)

"The decision of the court is that the brokers were not liable for conversion."

The opinion in this case was written by Crane, J. and concurred in by the following able jurists: Cardozo, C. J., and Pound, Lehman, Kellogg, O'Brien and Hubbs, J. J. This opinion may well be paraphrased to fit the instant case by substituting the word "banker" for "broker".

In connection with the thought of this New York case, we call the Court's attention to the inconsistency of the dissenting opinion of the United States Court of Appeals in the case at bar. In the Court's dissenting opinion at the top of page 505 it treats defendant bank in the transaction of redeeming the bonds as an assignable one and therefore controlled by the "law of the place of assignment". On page 510, however, while admitting defendant "Indiana Bank was not a purchaser", the opinion states it was a "holder" because it was in possession of an instrument payable to bearer. This opinion entirely disregards the fact that defendant bank paid no consideration whatever for these bonds in the transaction. It was a mere conduit to pass them to the Federal Reserve Bank, the proper place for redemption. They were redeemed, the proceeds paid out, and a small charge made for its services. The dissenting opinion fails to adhere to this plain, simple statement of the facts, hence its inconsistency and error. We have here called attention to the foregoing facts in connection with the New York case cited because of its close similarity, by analogy, to the instant case.

The law of Pennsylvania, contrary to the contention of petitioner, appellant, fully supports this position, as is shown by *First National Bank of Blairstown vs. Goldberg et al.*, 340 Pa. 337, wherein the Pennsylvania Supreme

Court sustained a judgment *non obstante veredicto* in favor, *inter alia*, the defendant, a bank which had handled bonds under facts very similar to those in the instant case. While there is certain *dicta* in this case which the trial court and plaintiffs in the instant case, took from context and misapplied, the clear holding of that case, throughout, is in full support of the position of defendant bank here. We quote from the Goldberg case as follows:

> "in the present case, defendants did not part with value for the bonds, but they do not claim any right, title or interest therein as holders; they derived no benefit from the transactions, acting merely as agencies to place the bonds in the hands of brokers for sale and to transmit the proceeds in return. The purpose of the Negotiable Instruments Law is to enhance the marketability of such securities and to allow bankers, brokers and people generally to trade in them with confidence. That object would be defeated if liability were to be imposed upon one who, mistakenly but in good faith, deals with negotiable instruments on the assumption that they belong to the person who employs him to effect their sale through ordinary market channels."

As stated above, though a jury rendered a verdict for plantiff, the lower court entered judgment *n. o. v.* for defendant bank (along with other defendants) and the Supreme Court affirmed. Consistent with the court's opinion and the results as to the defendant Bank, in this Pennsylvania Case, the affirmance of a judgment *non obstante veredicto* placed the burden of proof of the case on the plaintiff.

The foregoing decisions all follow the Federal and State law and are applicable to bearer United States Government bonds.

As we have previously stated, the Uniform Negotiable Instrument laws adopted by the different states will not

establish uniformity in a particular instance of fact due to the variations, amendments and changes made to it by the different states. As an example of these variations and changes, we refer to the laws of the State of Illinois which have twelve amendments to the Uniform Negotiable Instrument Law (see Smith-Hurd Ill. Annot. Statutes Vol. 98, Sections 25, 26, 29, 60, 69, 77, 81, 86, 88, 91, 141 and 207.) New York State law has many changes and variations. The Commonwealth of Pennsylvania has recently repealed it entirely by the enactment of the Uniform Commercial Code (1953 April 6, P. L. 3, Sections 10-103) (12 A. Purdon's Pennsylvania Statutes Sections 10-103). Further references to changes, amendments and variations from the Negotiable Instruments Law of other states need not here be referred to to show lack of uniformity.

But even more important, Section 59 the Uniform Negotiable Instruments Law does not purport to cover the circumstances of the case at hand. The sections of that law which plaintiffs would have apply pertain to the parties in the position of purchasers as such, and not "conduits" or "transfer agents" as the defendant bank here is.

V

The Trial Court erred in admitting in evidence Exhibits 7, 8, 9 and 10 on the assumption that knowledge of their contents would be proven to have reached defendant bank, and when not so proven, to have stricken them from the record.

The majority opinion of the United States Court of Appeals found it unnecessary to discuss specifically these exhibits. However, since the dissenting opinion refers to them (514), we here call attention to what we regard as

error by the Trial Judge in admitting them as evidence and permitting them to be read to the jury.

These exhibits are referred to in our "Statement of Case" pages 5, 6, which refers to the pages in the record where they were read to the jury. That they were offered in evidence in an undertaking to charge knowledge of their contents to defendant bank appears from the statement of counsel when offering Exhibit 7, as follows:

> "It is also offered as one of a series of documents intended to show the wide notice given to the loss of these bonds. And for that purpose, it is offered against all the defendants." (93a, 94a).

When objections were interposed in connection with the offer of Exhibit 9, the following occurred (106a):

> "The Court: It is admitted under the Business Records Rule. The question of what it says and so forth is for the jury. There may be matters of hearsay and all that sort of thing.
>
> As I understand, you are still offering on the question of notice.
>
> Mr. Kirkpatrick: We are still offering on the question of notice and we take it it is our duty to offer the notice in the form it was actually given."

The Court again, in discussing the admissibility of Exhibit 9 (107a) states:

> "The Court: *It is admissible for any purpose.* The mere fact that it has something of that kind in it, it is still admissible." (Emphasis supplied.)

It is difficult to see how these exhibits are business records between plaintiff and defendant bank when they never had any business dealings whatever with each other. This Exhibit 9 was read before the jury (251a) under objections overruled in behalf of defendant bank (108a, 109a). We stressed and emphasized our objections to this exhibit and the others, as will appear by reference to the record pages 125a to 127a inclusive. Following a discussion from page

128a to 133a counsel for defendant bank moved to strike the Exhibit 9 and previous exhibits from the record. On page 134a the Court finally made the following statement:

> "Now, the question is, it isn't necessarily conclusive on your man, your bank, as to whether they got it or whether they didn't. But notices went out through banking channels. *If he wants to bring that home to you, that is up to him.*" (Emphasis supplied.)

Here we submit it is clear they were read on the assumption that their contents would later be brought home to defendant bank. The record can be searched from cover to cover and neither the contents of Exhibit 7, 8, and 9 nor that of Exhibit 10 were ever brought home to defendant bank as the Court indicated would have to be done. Throughout in the trial in the offer of these exhibits we submit there was the assumption that their contents, by proper evidence, would be brought to the knowledge of defendant bank, and when not done they should have been stricken from the record.

Plaintiff made a strenuous effort to prove that the contents of these exhibits reached defendant bank by calling Mr. Halford, of the Federal Bureau of Investigation (188a *et seq.*), which entirely failed. Even the dissenting opinion concedes it was not shown that the contents of these exhibits ever reached defendant bank, which appears from the following statement (514, 515):

> "It is not claimed that any of these reached the Indiana Bank so as to charge it with the knowledge which these notices contain."

It is difficult, however, to understand how a "hue and cry" explanation made by this dissenting opinion would justify their admission when the "hue and cry" was made in California in 1944 and the transaction in this case occurred in Pennsylvania in 1948. (Knowledge of a director or depositor of defendant bank is not chargeable to the bank.

U. S. National Bank vs. Evans, 296 Pa. 541, 547, American National Bank vs. Miller, 229 U. S. 517 and 7 A M. Jur. Par. 284 under heading "Banks").

We further submit any statement which may be found by the Trial Judge regarding these exhibits and their effect could not possibly overcome their prejudicial results before the jury. The following cases support our position that these exhibits were inadmissible:

Graham vs. White-Phillips Co., 296 U. S. 27 (1935);

Merchant's National Bank vs. Detroit Trust Co., 258 Mich. 526, 242 N. W. 739 (1932);

Kentucky Rock Asphalt Co. vs. Mazza's Administrator, 264, Ky. 158; 94 S. W. (2d) 316 (1936);

State Bank of Benkelman vs. Iowa-Des Moines National Bank & Trust Co., 223 Iowa 596, 273 N. W. 160 (1937).

These cases all follow a well established rule that even though one may have received actual notice, if by forgetfulness or negligence he does not have it in mind when the bonds were received, he is still regarded as acting in good faith. Graham vs. White-Phillips Co., 296 U. S. 27 (1935) is probably the leading case on this question. In that case, eight negotiable bonds were stolen from the plaintiff on August 30, 1930, and were purchased by the defendant in the ordinary course of its brokerage business on September 22, 1930. The plaintiff had caused notice to be sent to the defendant and other dealers just three days after the theft occurred. Yet, although *less than three weeks* had elapsed between receipt of the notice and the purchase of the bonds by defendant, the Court held that defendant had none the less acquired title to the bonds as a holder in due course, and was not liable; yet in the case at bar, by the element of time alone more than four and one-half years had elapsed since the so-called notices (with no proof of delivery).

When the rule as herein stated was applied to a holder of securities in due course, it should all the more apply to a mere agent for collection or redemption.

We might further discuss the error in admitting in evidence these exhibits, but this Court may find it unnecessary to do more than conclude as did the majority decision of the Third Circuit, that the evidence does not "show any bad faith on the part of the Indiana bank". There is no evidence in the case by which to charge defendant bank with any notice of any kind whatever.

Reply to certain matters contained in Brief of Plaintiff, Bank of America National Trust and Savings Association.

One of the errors of plaintiff in this case is the assumption that defendant bank's defense was made on the basis that it was or became a "holder in due course" of the bonds in question. In its Summary of Argument, page 10, is made the following statement: "The defendants had the burden of proving their asserted defense of being holders in due course." A heading in plaintiff's Brief of Argument, page 36, is as follows: "The defendant-respondents had the burden of proving their asserted defense of being holders in due course". Defendant bank never did assert, nor did it ever attempt to defend this case as a "holder in due course". This statement is verified by reference to defendant bank's Answer, beginning at page 15a of the record. It will be noted that Paragraph 7, sub-paragraphs (b) and (c) in the Answer, page 16a, expressly alleged the bonds were received by defendant bank "*for redemption*". This same statement is made with reference to the second lot of bonds, which appears in sub-paragraphs (g) and (h), page 17a of defendant bank's Answer. To the effect that defendant bank did

not defend as a holder in due course is further substantiated by reference to certain excerpts from a colloquy on defendant bank's Argument on its Motion for Dismissal of this case before the Trial Judge. On page 228a and 229a of the record appears the following:

> "The Court: * * * In other words, you didn't buy those bonds for investment."
>
> Mr. Miller, Jr.: Oh, no. We were—undoubtedly it (209) was a situation of conduit, as described—"

On page 232a of the record appears the following:

> "The Court: Well, according to that, you are in a different position than Mr.—we will say Mr. Parnell is? (212) Is there a distinction in your two positions?
>
> Mr. Miller, Jr.: There might be some distinction, yes, your Honor, because it is a customary practice of banks to take these bonds in, particularly national banks I think would be subject to criticism if they *refused their customers receiving Government securities for clearance.*" (Emphasis supplied)

Further, on said Motion, page 264a, appears the following:

> "The Court: The difference in your position and the position of the banks in the cases you cite is that those banks purchased the securities and you didn't, in this case.
>
> Mr. Miller: *In one of those cases, I believe it was a situation of a conduit.* But I think a purchaser of a security is even in a more tenuous position as far as the burden of proof than a *mere conduit banking institution for banking purposes.*" (Emphasis supplied)

We are at a complete loss to understand upon what possible state of facts in this case plaintiff-petitioner contends and argues "the defendants had the burden of proving their asserted defense of being holders in due course." Even the trial judge in his opinion (446a) makes this statement:

> "The bonds were handed to the Bank in Indiana by Parnell and were, by the Bank in Indiana, forwarded to the Federal Reserve Bank by letter for collection. Neither Parnell nor the Bank in Indiana claimed to be a holder in due course within the definition of that term in the Negotiable Instruments Act, 56 P. S. 132."

Defendant bank never asserted otherwise than that it was a mere "conduit" or agent for the redemption or collection of these bonds and never claimed to have any title or right as a "holder in due course" or otherwise than as a mere collecting agent or representative. Based on the foregoing erroneous assumption, plaintiff then proceeds with a lengthy Negotiable Instruments argument which is entirely aside from any issue or question involved in this case.

Again plaintiff's Brief states (page 32):

> "Thus, the old rule exemplified by Murray v. Lardner, 2 Wall. 110, if correctly interpreted by the court below, is now completely outdated and should no longer be regarded as stating the rule applicable in the federal courts."

This statement is clearly answered by the United States Court of Appeals in its opinion, page 499, as follows:

> "Murray v. Lardner has never been overruled and has been referred to by the Supreme Court as late as 1935. See Graham v. White-Phillips Co., 296 U. S. 27, 32 (1935); Marine Bank v. Kalt-Zimmers Co., 293 U. S. 357, 364 (1934). See also 11 C. J. S. Bonds 654g, wherein it is pointed out that the federal law (and the common law) and the law under the Negotiable Instruments Act in many states are not in accord."

In fact, the decision of Murray v. Lardner is as important in establishing the credit of United States securities and their freedom in circulation as were the early decisions of Chief Justice John Marshall on constitutional questions. It is appropriate here to state that the section of the Negotiable Instruments Law, which plaintiffs advocate, is

almost entirely a codification of the law merchant far more ancient in origin than the doctrines of this Honorable Court which are here criticized.

Plaintiff's Argument, page 38, following a quotation from "Britton on Bills and Notes" refers to the cases of Keane v. National City Bank, 294 Fed. 214 (1928) and to Queenan v. Mays, 90 Fed. 2nd 525 (1932). This Keane case is one in which a new trial was ordered after judgment for defendant. It involved not the clearance of bonds, but the cashing of drafts by a bank for a person of known ill-repute and where the bank was fully informed of adverse facts. The Queenan case was tried on an agreed statement of facts which admitted the bank never gave value for the bonds in question at any time and was therefore unjustly enriched as a result of its *wrongful hypothecation* for its own use. Neither the quotation from Britton on Bills and Notes nor the facts in the cases cited in connection therewith can have any possible application to the facts in the instant case.

The Circuit Court of Appeals by its decision found it unnecessary to consider several questions which were raised by defendant bank on error from the Court below. (Opinion of the Court, Record p. 504 (fol. 66). We take it that these questions are not therefore here raised on this appeal.

Conclusion

If Federal law and the law of Pennsylvania were in conflict as they applied to the facts of this case, strong argument can be made to support the conclusion that Federal law, in the case of United States Government Securities, controls. Such issue of conflicts of laws is not here presented. For the law of Pennsylvania is in accord with the Federal law as it affects the issues of the case. The burden of proof of this case, as it stands on the evidence given at trial, is on the plaintiff. There is no evidence upon which a verdict and judgment for plaintiff can be sustained. The decision of the United States Court of Appeals for the Third Circuit, reversing the United States District Court for the Western of Pennsylvania and entering judgment for the First National Bank in Indiana, of Indiana, Pennsylvania, should be affirmed.

Respectfully submitted,

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Appendix

I.

Conformity Act, Title 28 U.S.C.A. Section 1652.

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply. June 25, 1948, c. 656, 62 Stat. 944.

II.

Statutory Provisions known as the "Home Owners Loan Act of 1933", Title 12 U.S.C.A. Section 1461 *et seq.*, as amended and approved by the Act of April 27, 1934, and Treasury Regulations issued thereunder.

III.

Certain pertinent excerpts from Treasury Regulations.

U. S. Treasury Department Regulations Circular No. 666 Para. 307.5: 6 Fed. Register 3726, 31 Code of Fed. Regulations Section 307.5 @ p. 396

> "307.5 * * * Such securities should be presented and surrendered * * * to any Federal Reserve Bank or Branch thereof, * * *. A Federal Reserve Bank, upon appropriate request, may make payment to a member bank from which bearer securities are received by crediting the amount in the member bank's account."

U. S. Treasury Department Regulations Circular 300, Para. 79: Title 31 Code of Fed. Reg. chapt. II, Section 306.79 @ p. 389

> "79. Coupon bonds or notes lost or stolen—The Treasury Department can grant no relief on account

of lost or stolen coupon bonds or notes. United States bonds and notes in coupon form are payable to bearer, and title thereto passes by delivery, without indorsement, and without notice to the Treasury Department. Under generally recognized principles of law an innocent purchaser for value without notice before maturity acquires good title to coupon bonds or notes even though reported lost or stolen, and no proof of ownership is required when coupon bonds or notes are presented in regular course to the Treasury Department, or its designated agencies, for payment, exchange or conversion. The Treasury Department assumes no responsibility whatever with respect to coupon bonds or notes reported lost or stolen and enters no stoppages or caveats against their payment, exchange, or conversion. This is the long-established policy of the Treasury, and is in accordance with the following public announcement made by the Secretary of the Treasury on April 27, 1867, and reaffirmed and republished from time to time as to United States bonds and notes in coupon form reported lost or stolen:

'In consequence of the increasing trouble, wholly without practical benefit, arising from notices which are constantly received at the Department respecting the loss of coupon bonds, which are payable to bearer, and of Treasury notes issued and remaining in blank at the time of loss, it becomes necessary to give this public notice, that the Government cannot protect, and will not undertake to protect, the owners of such bonds and notes against the consequences of their own fault or misfortune.

'Hereafter all bonds, notes, and coupons, payable to bearer, and Treasury notes issued and remaining in blank, will be paid to the party presenting them in pursuance of the regulations of the Department, in the course of regular business; and no attention will be paid to caveats which may be filed for the purpose of preventing such payment.

'The Treasury Department does not undertake to furnish any information with respect to the presentation of coupon bonds or notes reported lost or stolen,

but it will, wherever possible, in order to assist in tracing lost or stolen securities, furnish, upon appropriate written inquiry, such information as may be available in the Department as to whether or not bonds or notes reported lost or stolen have already been presented, and, if already presented, as to the source from which they were received. United States coupons bonds and notes are customarily handled in the regular course of business without reference to serial number, and in most cases, therefore, it is improbable that any information will be available as to the source from which received.' "

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CLERK

In The

Supreme Court of the United States

OCTOBER TERM, 1959

NO. 21

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, Petitioner

v.

GILBERT S. PARNELL, Respondent

NO. 22

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, Petitioner

v.

FIRST NATIONAL BANK IN INDIANA, Respondent

On Writs of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

This reply brief is addressed both to the brief filed on behalf of the defendant-respondent Parnell (referred to herein as "Parnell's Brief") and the brief filed on behalf of the defendant-respondent First National Bank in Indiana (referred to herein as "Bank's Brief").

Before proceeding further, it will be helpful to focus attention on the precise issue in the case. In his charge

to the jury, the trial court dealt with the question of burden of proof (R. 422), saying that—

> "if you find in this case that the plaintiff owned these bonds, that they were stolen from it—then the burden of proof so far as this plaintiff is concerned is to show that fact, that these bonds were owned by it, that they were lost by it in the manner as shown by its evidence. Then the two defendants, Parnell and the bank, not claiming to be owners for value, but as conduits for redemption, must come forward and they then have the burden of showing that they acted innocently, honestly, and in good faith."

Acting under this charge, the jury found a verdict against both respondents. (R. 439.) The jury must, therefore, have found that the defendants failed to meet the burden which was on them to show that they acted "innocently, honestly, and in good faith." (R. 422.)[1]

[1] In reaching this conclusion, the jury may have taken into account (a) that the defendant Rocco was not called by either respondent and even when called by petitioner was not cross-examined by either respondent (R. 493); (b) that, according to the testimony of Rocco, the defendant Parnell (a director of the defendant bank) received as his share of the proceeds of the bonds, five or six thousand dollars (R. 488) and not merely $650 as a retainer and fee for legal services as Parnell testified (R. 317-318); and (c) that despite the amounts involved, over $57,000 in the two transactions here in suit and in excess of $25,000 in an earlier third transaction (R. 478), Parnell received and disbursed the proceeds in $100 bills, and some smaller bills, there being no written records of the transactions except cashier's checks which Parnell endorsed and the bank immediately cashed. (R. 316-319, 344.) Reference is made also to the additional material set forth at pp. 4-5 of our main brief.

Before the respondents can prevail, they must establish two propositions. These are (1) that the question of the correctness of the court's charge on this point is governed by federal and not state law, and (2) that if the matter is one of federal law, the source of that law is to be found in decisions of this Court made many years ago before the enactment of the Negotiable Instruments Law.

These questions are discussed at length in our main brief. This reply brief is confined to answering certain arguments advanced by one or both of the respondents, to pointing out that certain collateral arguments are contrary to fundamental principles of law, and to correcting erroneous statements of matters of record.

I.

The Application of "Federal" Law in Determining the Liabilities of the Respondents Is Not Required or Called for by Any Statute or Regulation.

The respondent bank is a "member bank" of the Federal Reserve System. Great significance is attached to this fact in the brief filed on behalf of the respondent bank. In the Counter Statement of Questions Presented, the first question is phrased: "Can a member bank of the Federal Reserve System be held liable for conversion * * *?" (Bank's Brief 1.) And the second question is put: "Is Federal law applicable to determine the duties, rights and liabilities of parties in transactions involving Home Owners Loan Corporation Bonds * * * issued under Act of Congress authorizing Treasury regulations

concerning the redemption or collection thereof by member banks of the Federal Reserve System?" (Bank's Brief 2.)

Is there anything in any statute or regulation which permits the argument that Congress has preempted the field or indicated an intention that federal law is to govern the liabilities of the parties here? The statutes and regulations on which the respondent bank relies are all set forth under Point I (Bank's Brief 12-14) and in the Appendix (Bank's Brief 41-43) of its brief. The sole reference to a "member bank" is in Treasury Department Circular No. 666, quoted at page 14 of the Bank's Brief, where it is provided that "A Federal Reserve Bank, upon appropriate request, may make payment to a member bank from which bearer securities are received by crediting the amount in the member bank's account." The scope and effect of this provision seem crystal clear. It gives to the several Federal Reserve Banks the right to effect payment by a credit advice, instead of by cash payment or the delivery of a check, if the person presenting the bond so requests and is a member bank and, therefore, one to whom payment can be made by that method. We submit that the statutes and regulations set out in the Bank's Brief prove only the correctness of the statements in our original brief, at page 25, where we said:

> "The only statute relating to the bonds authorizes their issue and is completely silent as to the rights of owners and transferees, except that it is provided that the bonds are to be free of certain taxes. The United States Treasury Department Regulations are

equally silent so far as the rights of owners and transferees are concerned."

It is noted that the opinion of the court below does not seek in any way to support its conclusion on the basis of anything contained in any federal statute or regulation. We think that no such argument can be made and that it is idle to contend otherwise. The sole issue in the case at bar is whether the fact that property alleged to have been converted consisted of securities issued or guaranteed by the United States is sufficient, in and of itself, to require that the liabilities of the parties in the case at bar be determined in accordance with federal law. For the reasons set forth under point I of our original brief, we think that it is not sufficient. Supplementing the discussion in the original brief, and particularly the discussion at pages 18-20, we would refer to *Provident Savings Life Assurance Society v. Ford,* 114 U.S. 635, where it was argued that a suit on a judgment entered in a federal court was a suit arising under the laws of the United States. In answer to this argument, Mr. Justice Bradley replied at 114 U.S. 641-2:

> "What is a judgment, but a security of record showing a debt due from one person to another? It is as much a mere security as a treasury note, or a bond of the United States. If A brings an action against B, trover or otherwise, for the withholding of such securities, it is not therefore a case arising under the laws of the United States, although the whole value of the securities depends upon the fact of their being the obligations of the United States. So if A have title to land by patent of the United States and brings an action against B for trespass

> or waste, committed by cutting timber, or by mining and carrying away precious ores, or the like, it is not therefore a case arising under the laws of the United States. It is simply the case of an ordinary right of property sought to be enforced."

In the absence of any trace of any indication by Congress that this is a matter which should be governed by a special federal rule, no reason is seen why this Court should undertake to prescribe such a rule. This is a federal nation, in which substantial functions are assigned to the States. One of the clearest of these is the regulation of the rights of property between private parties, especially in situations where no interest of the federal government is involved. To say, in the absence of any legislative intimation, that such a matter is governed by a federal rule would be to make new law where none is called for, and would be an interference with the traditional scope of action by the States which might be legitimately questioned. Congress has not called for uniformity and it is hardly the function of the Court to occupy the field.

In Parnell's Brief, it is argued (p. 39) that there must be a uniform federal rule with respect to transfers of government bonds because the rule leaving this matter to state law "would practically transform the nature of bearer obligations into instruments passing by endorsement," and "would completely destroy the usefulness of government bearer bonds as a readily circulating liquid medium of investment. . . ." "Bearer bonds," we are told (Parnell's Brief 40), "as we have known them in the past, would be eliminated from the picture.

The Treasury would be limited to issuance of securities having the characteristic features of registered or non-transferable bonds."

The exaggerated nature of this argument is patent. If arguments against it are needed, they may be summarily stated as follows: (1) Nothing of the sort has happened over the past many years when it has surely not been clearly established that these matters are governed by a uniform federal rule. (2) All of the States have and maintain the rules of "bona fide purchase" and "holder in due course." All that need be done by the purchaser or person dealing with government bonds is to show that he handled them "innocently, honestly, and in good faith." (R. 422.) (3) Congress can apparently control the situation if it should ever conclude, as it has not, that action on its part is necessary. (4) Moreover, the interest and concern of the federal government works both ways. Persons who subscribe to bonds, or who purchase them on the market, will be more interested in doing so if they have a reasonable assurance that they will not lose their title to their bonds by anything short of a genuine bona fide purchase.

In short: Congress has not indicated any desire that transactions in government bonds between private parties should be governed by a uniform federally prescribed rule, and no reason is advanced why such a rule would be advantageous or desirable. On the contrary, the establishment of a federal rule on this matter would be an entry into an area which has been traditionally left to the States in our Federal system of government; such an interference with the States' sphere of action

should not be undertaken by the Court on its own motion, when Congress has not spoken.

It is noted that *United States v. Kramel,* cited at page 19 of the petitioner's brief, is now reported in 234 F. 2d 577.

II.

It Is Wholly Immaterial Whether the Defendants Acted as "Agents" or "Conduits," or as "Purchasers."

It is argued, in one form or another, throughout the brief filed on behalf of the respondent bank that it was not liable because it acted in the transaction not as a "purchaser," but only as an "agent" or "conduit." The same argument is advanced in point II of the brief filed on behalf of the respondent Parnell, but in that brief the thrust of the argument is entirely different. It is said (Parnell's Brief 38) that "Assuming that federal law governs the process of transmitting government bearer bonds through the channels of the Federal Reserve System," the defendant Parnell was but an intermediary in that process and, therefore, may not be charged with liability on the theory that he was a "purchaser" of the bonds.

We think it makes no difference whatever whether Mr. Parnell and the respondent bank are considered as "agents" or "conduits," or as purchasers." We have never contended, as respondent bank asserts (Bank's Brief 15), that liability attached to either defendant because it was "a holder in due course or purchaser." What we have argued, as we think rather clear from our brief, is that the defendants may not escape liability on the ground that either of them was "a holder in due

course." The issue in this case is whether the defendants acted innocently and in good faith. If they did, they are not liable whether they acted as purchasers or as agents only. All this, we think, is very clear on the basis of fundamental law under all the authorities, including those cited by the respondents.

The settled law is as stated in *Morissette v. United States,* 342 U.S. 246, where Mr. Justice Jackson said, at page 270:

> "In the civil tort, except for recovery of exemplary damages, the defendant's knowledge, intent, motive, mistake, and good faith are generally irrelevant. If one takes property which turns out to belong to another, his innocent intent will not shield him from making restitution or indemnity, for his well-meaning may not be allowed to deprive another of his own."

An agent is not exempt from liability for conversion. At common law and apart from the protection afforded by the law of negotiable instruments, an agent who disposes of goods or chattels on behalf of a principal who has no title to the goods is liable to the rightful owner. It matters not in the slightest that he acted only as an agent. To use the words of Mr. Justice Holmes:

> "If an auctioneer in the most perfect good faith, and in the regular course of his business, sells goods sent to his rooms for the purpose of being sold, he may be compelled to pay their full value if a third person turns out to be the owner, although he has paid over the proceeds, and has no means of obtaining indemnity." Holmes, *"The Common Law,"* page 83.

Modern law has made this exception, and it is the exception and not the general rule as one would suppose from the briefs of the respondents, that an agent is not liable if the property dealt with by the agent consists of current money or a negotiable instrument, where the transferee becomes a holder in due course and the agent has acted innocently and in good faith. In other words, the rule of strict liability gives way to the extent of the protection afforded by the law of negotiable instruments, whether statutory or otherwise. The pertinent law as it exists today is correctly and exactly stated in the *Restatement, Torts,* 1948 Supplement, §233:

> "§233. CONVERSION BY DISPOSITION BY AGENT OR SERVANT AS AGAINST ONE OTHER THAN BAILOR.
>
> (1) Except as stated in Subsection (2), one who as agent or servant of a third person disposes of a chattel to one not entitled to its immediate possession in consummation of a transaction negotioted by the agent or servant is liable for a conversion to another who, as against his principal or master, is entitled to the immediate possession of the chattel.
>
> (2) The statement in Subsection (1) is not applicable to an agent or servant who disposes of current money or a document negotiable by common law or by statute pursuant to a transaction by which the transferee becomes a holder in due course of such money or document, unless the agent or servant knows or has reason to know that his principal or master does not have authority so to dispose thereof."

The Comment on Subsection (2) is, in part, as follows:

"Comment on Subsection (2):

c. Negotiable instruments. The statement in Subsection (1) is not applicable to an innocent agent or servant who transfers current money, or, whether by endorsement or delivery, a document negotiable by common law or by statute under circumstances which make the transferee a holder in due course thereof. If, however, the agent or servant at the time of such disposition knows or has reason to know that his principal or master is not authorized so to dispose of the money or document, such agent or servant is liable to the person entitled to the immediate possession thereof.

d. The statement in this Subsection is applicable only when the transferee received the instrument under circumstances which make him a holder in due course. If, for any reason, the transferee fails to obtain title to the instrument, the agent or servant who negotiates it either by endorsement or delivery is liable to the person entitled to the immediate possession of the instrument for its conversion."

The *Restatement, Agency,* §349 is in accord.

There is not the slightest doubt about the law of Pennsylvania. *Lindsley v. First National Bank of Philadelphia,* 325 Pa. 393, 190 Atl. 876 (1937), was an action against a bank to recover the aggregate of sixty-five checks deposited with the defendant bank, which had collected them and paid the amount of the checks to its depositor. The checks bore forged endorsements. It was held that the bank had converted the plaintiff's prop-

erty and the fact that it had acted only as a collecting bank was no defense. The court said at page 397:

> "But in receiving a check for collection, the collecting bank gets no title to the check if the holder depositing it had none; by collecting it, and crediting the collection to the depositor, the bank necessarily assumes dominion over it inconsistent with the payee's control over his own property; this is conversion."

Gruntal v. United States Fidelity & Guaranty Co., 254 N.Y. 468, 173 N.E. 682 (1930), upon which both respondents rely and which is quoted extensively at page 29 of the Bank's Brief, is not contrary to these fundamental principles of law, but in full accord. It was held in that case that an agent who had acted *innocently and in good faith* in disposing of negotiable securities was not liable. The crucial matter was his good faith. The very extract quoted at page 29 of the Bank's Brief leaves no doubt on that score. Quoting from an earlier Massachusetts decision, the court said:

> "The question for decision therefore is whether the defendants who received and sold the bonds and accounted for the proceeds to the apparent owner, *without notice of any infirmity in the title, or of any circumstances which should have put them upon inquiry,* can be held responsible in damages by the true owner for conversion." [Emphasis supplied.]

But in the case at bar the whole matter to be decided is whether the so-called "agents" did act "without notice of any infirmity in the title, or of any circumstances which should have put them upon inquiry".

There is nothing in the opinion, or in the result, in *First National Bank of Blairstown v. Goldberg,* 340 Pa. 337, 17 A. 2d 377 (1941), to support the argument (Bank's Brief 31) that under the law of Pennsylvania the burden of proof in this case rested on the petitioner. Again, as in the *Gruntal* case, there was no question as to innocence and good faith. The question was whether one who acted only as an agent could escape liability for conversion. The question is stated in the opening paragraph of the opinion, 340 Pa. 338:

> "There is a singular dearth of authority in regard to the principal question involved in this case, which is whether a person who, as agent, assists another in the sale of stolen negotiable bonds, but turns over all the proceeds to his principal and acts throughout the transaction innocently and in good faith, is liable for conversion of the bonds in an action by the owner."

The fact that a judgment notwithstanding the verdict in the *Goldberg* case was affirmed affords no basis for an argument that under Pennsylvania law the burden of proof rested on petitioner in the case at bar. The cases cited at page 36 of our original brief show that burden did not rest on the petitioner, and the *Goldberg* case recognizes this. We quote from the opinion, 340 Pa. 340:

> "It was incumbent upon plaintiff to prove only its ownership and loss of the bonds, and the burden would then have shifted to defendants to show that they came into possession of the securities under such circumstances as to relieve them from liability for a conversion. Plaintiff, however, itself presented all of the facts through cross-examination of Gold-

berg, and is bound by his testimony, there being no contradiction of it: *Krell v. Jacobson,* 314 Pa. 522, 527, 172 A. 697, 699. From that testimony no inference of bad faith on the part of either defendant can be drawn."

There is no doubt as to the *Pennsylvania* rule with respect to the burden of proof. Not only the District Judge, and the minority in the court below, but the majority also would seem to agree. The action of the majority in the court below was predicated solely on the applicability of *federal* law. No other basis is discussed, and it is expressly stated (R. 497): "The appellants urge that federal law, under which they claim significantly different results would be reached, should have governed the case." And again (R. 499): "Under federal law, we think the established rule is as appellants say."

It is obvious, of course, from what has been said that it is wholly immaterial whether or not the respondents are termed "holders" as that term is defined in the Negotiable Instruments Law. If they choose not to assert the defense of being "holders in due course", that is their privilege. In the interest of a logical development of the case, we would point out however that the term "holder" as defined in the Negotiable Instruments Law is not the equivalent of "purchaser". The term "holder" is basic to the framework of the Negotiable Instruments Law and is defined in that law as follows:

" 'Holder' means the payee or indorsee of a bill or note, who is in possession of it, or the bearer thereof." (Section 191 of the Pennsylvania Negotiable Instruments Act of May 16, 1901, P.L. 194, Purdon's Pa. Stat. Ann. Tit. 56, §492 (1930).)

Since the respondents were admittedly in possession of a bearer instrument, each was a "holder" within the clear terms of the definition. If authority in addition to the plain words of the statute is required, we cite *McKinley v. Wainstein,* 81 Pa. Super. Ct. 596 (1923), where it is held that the indorsee of a check who took the check for collection was a "holder" and therefore entitled to sue in his own name under Section 51 of the Negotiable Instruments Law.

III.

The Exhibits Said to Have Been Improperly Admitted in Evidence During the Trial Were Admissible on the Basis of the Record.

It is argued in Point V (Bank's Brief 32-6) that certain exhibits (Petitioner's Exhibits 7, 8, 9 and 10) were admitted in evidence on "the assumption that knowledge of their contents would be proven to have reached defendant bank", that such evidence was not given and, therefore, that the trial court erred in not striking the exhibits from the record. This argument is without merit because the record shows so clearly as to leave no doubt whatever that the facts of record are not as the respondent bank says.

The record shows that the trial court refused, throughout the trial, to admit Exhibits 7, 8 or 9 generally or for the purpose of showing notice to the respondent bank. As to all defendants other than the Federal Reserve Bank of Cleveland[1], the trial court admitted the exhibits for the limited purpose of nega-

[1] These exhibits and Exhibit 10 were all taken from the files of the Federal Reserve Bank and were admitted while it was a defendant and generally as to it. (R. 94-95, 99, 105, 114.)

tiving the proposition[9] that the bonds left petitioner's bank in the ordinary course of business. It specifically refused to admit them as any evidence of notice to the respondent bank in the absence of evidence that the exhibits had come, or might reasonably be inferred to have come, to the respondent bank. This was explained by the trial judge on at least three occasions and so clearly as to not permit an argument that he was in any way misled or confused (R. 102-3, 113-14, 133-134). We think it unfortunate, if not somewhat unfair, that, by the isolated sentences quoted at pages 33-34 of the respondent Bank's Brief, it is argued otherwise.

The situation with respect to Exhibit 10, as disclosed by the record, only emphasizes what we have said as to the clear understanding of the trial judge with regard to the admissibility of the four exhibits in question. Exhibit 10 was a circular, dated May 20, 1944, put out by the Pittsburgh office of the Federal Bureau of Investigation. It was addressed to "All Banks and Security Brokers" and the circular is attached in the record at page 453. When the circular was first offered, the trial court refused to admit it in evidence in the absence of testimony from the Federal Bureau of Investigation as to where it was sent (R. 128-130). To avoid any possible prejudice to the other defendants, counsel for petitioner agreed not to offer the circular even against the Federal Reserve Bank at that time, but to place upon the record a stipulation to the effect

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[9] The questions repeatedly put to plaintiff's witness Britton on cross-examination could well create the impression that the bonds had not been stolen, but had been misplaced only, or taken by an employee of petitioner. (R. 64-82.)

that the Federal Reserve Bank had received from the Federal Bureau of Investigation a notice of the theft of the bond (R. 142-143). Later during the trial, petitioner subpoenaed the agent in charge of the Pittsburgh office of the Federal Bureau of Investigation, who testified that Indiana, Pennsylvania, was within the geographical area served by the Pittsburgh office and that Mr. H. T. O'Connor, whose name appeared in the circular, had been in charge of the Pittsburgh office in May, 1944, when the circular was issued (R. 189-190). The witness objected to the production of the file of the Federal Bureau of Investigation on the basis of Bureau policy (R. 196). In order to avoid a direct ruling upon the question of the availability of the file, the court suggested that the witness examine the file and report as to whether or not it disclosed anything relative to Exhibit 10, as to whom or when it was sent (R. 200-201). In lieu of producing the file, it was later stipulated what the Federal Bureau of Investigation Agent Hallford would testify if called. The stipulation (R. 249-250) was to the effect that Exhibit 10 had been put out by the Pittsburgh office of the Federal Bureau of Investigation at the request of the Los Angeles office of the same organization, and that the file disclosed that subsequent to the mailing of the circular the Pittsburgh office had by letter advised the Los Angeles office "that the circular had been mailed to all banks and security brokers in the Pittsburgh district" (R. 249-250). After this evidence of the mailing of Exhibit 10, the exhibit was admitted in evidence as to the respondent bank and the Federal Reserve Bank of Cleveland (R. 250).

We think that all four exhibits were admissible as evidence of notice, but as Judge Goodrich has so succinctly said (R. 515): "we need not decide this" on this record.

Conclusion.

The collateral questions raised by the respondents are clearly without merit. They were not relied on in any way by the majority below, and the minority opinion expressly states that "there is no merit in them and they do not require discussion." (R. 516.)

When these matters are cleared away it is apparent that the sole issue in the case is the one passed upon by the Court below, namely, whether the question of the burden of proof of good faith is a matter to be decided in accordance with the law of Pennsylvania where the transactions occurred, or is one to be governed by some sort of federal law, though no rule of any sort has been prescribed by Congress.

For the reasons stated in our principal brief and supplemented here, we submit that the question of burden of proof of good faith in this case was properly submitted to the jury in accordance with the established law of Pennsylvania. Accordingly, the judgments of the Court of Appeals should be reversed and the judgments of the District Court affirmed.

Respectfully submitted,

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October 1956.

SUPREME COURT OF THE UNITED STATES

Nos. 21 AND 22.—OCTOBER TERM, 1956.

Bank of America National Trust and Savings Association, Petitioner, 21 v. Gilbert S. Parnell. Bank of America National Trust and Savings Association, Petitioner, 22 v. First National Bank in Indiana.	On Writs of Certiorari to the United States Court of Appeals for the Third Circuit.

[November 13, 1956.]

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

Petitioner, alleging diversity of citizenship, brought suit in the District Court for the Western District of Pennsylvania alleging that in September and October 1948 two individual defendants, Parnell and Rocco, and two corporate defendants, the First National Bank in Indiana and the Federal Reserve Bank of Cleveland had converted 73 Home Owners' Loan Corporation bonds which belonged to petitioner. Only Parnell and the First National Bank are respondents here since the Federal Reserve Bank was dismissed, on its motion, after petitioner had presented its case in the District Court, and since Rocco did not appeal from the District Court's judgment.

At the trial it appeared that these bonds were bearer bonds with payment guaranteed by the United States. They carried interest coupons calling for semi-annual payment. They were due to mature May 1, 1952, but pursuant to their terms, had been called on or about

May 1, 1944. On May 2, 1944, the bonds disappeared while petitioner was getting them ready for presentation to the Federal Reserve Bank for payment. In 1948 they were presented to the First National Bank for payment by Parnell on behalf of Rocco. The First National Bank forwarded them to the Federal Reserve Bank of Cleveland. It cashed them and paid the First National Bank, which issued cashier's checks to Parnell. Parnell then turned the proceeds over to Rocco less a fee—there was conflicting testimony as to whether the fee was nominal or substantial.

The principal issue at the trial was whether the respondents took the bonds in good faith, without knowledge or notice of the defect in title. On this issue the trial judge charged:

> "As I have indicated, however, in the case—and if you find in this case that the plaintiff owned these bonds, that they were stolen from it—then the burden of proof so far as this plaintiff is concerned is to show that fact, that these bonds were owned by it, that they were lost by it in the manner as shown by its evidence. Then the two defendants, Parnell and the bank, not claiming to be owners for value, but as conduits for redemption, must come forward and they then have the burden of showing that they acted innocently, honestly, and in good faith. . . ."

The jury brought in verdicts for petitioner against both respondents. On appeal, the Court of Appeals for the Third Circuit, the seven circuit judges sitting *en banc*, reversed, with three judges dissenting. It held that the District Court had erred in treating the case as an ordinary diversity case and in regarding state law as governing the rights of the parties and the burden of proof. 226 F. 2d 297. It considered our decision in *Clearfield Trust Co.* v. *United States*, 318 U. S. 363, controlling and held that federal law placed the burden of proof on petitioner

to show notice and lack of good faith on the part of respondents. The court further found that there was no evidence of bad faith by the First National Bank since the bonds were not "overdue" as a matter of federal law when presented to it and therefore directed entry of judgment for it. The court found that there was evidence of bad faith on the part of Parnell but ordered a new trial because of the erroneous instructions.

The dissenters agreed in applying the doctrine of the *Clearfield Trust* case to determine the nature of the contract and the rights and duties of the United States as a party but not the rights of private transferees among themselves. They, like the majority, looked to federal law to determine whether the bonds were "overdue paper" when presented to the First National Bank. They concluded that since the respondent bank knew of the call, as to it, the bonds became demand paper and that the bank took the paper an unreasonable length of time after maturity, as advanced by the call.

In the view of the dissenters state law was controlling with respect to proof of good faith and the burden thereon. They found that state law placed the burden of proof on respondents to demonstrate their good faith, and that there was sufficient evidence to support the jury's verdict that the burden of proving good faith had not been sustained even if, with respect to the respondent bank, the bonds were not to be regarded as demand paper taken an unreasonable time after maturity, as advanced by the call.

Petitioner sought a writ of certiorari to review the judgments of the Court of Appeals. Because the determination of the applicable law raised an important issue of federal-state relations, we granted certiorari. 350 U. S. 963.

The District Court in this suit, based on diversity jurisdiction, for the conversion in Pennsylvania of pieces of

paper of defined value deemed itself a court of Pennsylvania in which, in view of the nature of the claim, Pennsylvania law would govern. See *Guaranty Trust Co.* v. *York*, 326 U. S. 99, 108. But respondents claim, and the Court of Appeals sustained them, that the decision in *Clearfield Trust Co.* v. *United States*, 318 U. S. 363, compels the application of federal law to the entire case. The Court of Appeals misconceived the nature of this litigation in holding that the *Clearfield Trust* case controlled. In that case we held that a suit by the United States to recover on an express guaranty of prior endorsements on a Government check with a forged endorsement was governed by federal law. The basis for this decision was stated with unclouded explicitness:

> "The issuance of commercial paper by the United States is on a vast scale and transactions in that paper from issuance to payment will commonly occur in several states. The application of state law, even without the conflict of laws rules of the forum, would subject the rights and duties of the United States to exceptional uncertainty." 318 U. S., at 367.

Securities issued by the Government generate immediate interests of the Government. These were dealt with in *Clearfield Trust* and in *National Metropolitan Bank* v. *United States*, 323 U. S. 454. But they also radiate interests in transactions between private parties. The present litigation is purely between private parties and does not touch the rights and duties of the United States. The only possible interest of the United States in a situation like the one here, exclusively involving the transfer of Government paper between private persons, is that the floating of securities of the United States might somehow or other be adversely affected by the local rule of a particular State regarding the liability of a converter. This is far too speculative, far too remote a possibility to jus-

tify the application of federal law to transactions essentially of local concern.

We do not mean to imply that litigation with respect to Government paper necessarily precludes the presence of a federal interest, to be governed by federal law, in all situations merely because it is a suit between private parties, or that it is beyond the range of federal legislation to deal comprehensively with Government paper. We do not of course foreclose such judicial or legislative action in appropriate situations by concluding that this controversy over burden of proof and good faith represents too essentially a private transaction not to be dealt with by the local law of Pennsylvania where the transactions took place. Federal law of course governs the interpretation of the nature of the rights and obligations created by the Government bonds themselves. A decision with respect to the "overdueness" of the bonds is therefore a matter of federal law, which, in view of our holding, we need not elucidate.

This conclusion requires reversal of the judgments of the Court of Appeals but not reinstatement of the judgments of the District Court. The Court of Appeals did not originally consider all the points raised by respondents. Moreover, since the Court of Appeals misconceived the applicable law, it is for that court to review the judgments of the District Court in the light of the controlling state law. The Court of Appeals has not decided what the governing state law on burden of proof is, and it is the court which should so decide. Likewise, if state law casts the burden on respondents to demonstrate their good faith, it is for the Court of Appeals to assess the evidence in light of that standard.

The judgments of the Court of Appeals for the Third Circuit are therefore reversed and the cases are remanded to that court for proceedings in conformity with this opinion.

Reversed and remanded.

SUPREME COURT OF THE UNITED STATES

Nos. 21 AND 22.—OCTOBER TERM, 1956.

Bank of America National Trust and Savings Association, Petitioner, 21 *v.* Gilbert S. Parnell. Bank of America National Trust and Savings Association, Petitioner, 22 *v.* First National Bank in Indiana.	On Writs of Certiorari to the United States Court of Appeals for the Third Circuit.

[November 13, 1956.]

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS, dissenting.

We believe that the "federal law merchant," which *Clearfield Trust Co.* v. *United States,* 318 U. S. 363, 367, held applicable to transactions in the commercial paper of the United States, should be applicable to all transactions in that paper. Indeed we said in *National Metropolitan Bank* v. *United States,* 323 U. S. 454, 456, that "legal questions involved in controversies over such commercial papers are to be resolved by the application of federal rather than local law." Not until today has a distinction been drawn between suits by the United States on that paper and suits by other parties to it. But the Court does not stop there. Because this is "essentially a private transaction," it is to be governed by local law. Yet the nature of the rights and obligations created by commercial paper of the United States Government is said to be controlled by federal law. Thus, federal law is to govern some portion of a dispute between private parties, while

that portion of the dispute which is "essentially of local concern" is to be governed by local law. The uncertainties which inhere in such a dichotomy are obvious. Cf. *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205; *Davis* v. *Department of Labor*, 317 U. S. 239.

The virtue of a uniform law governing bonds, notes, and other paper issued by the United States is that it provides a certain and definite guide to the rights of all parties rather than subjecting them to the vagaries of the law of many States. The business of the United States will go on without that uniformity. But the policy surrounding our choice of law is concerned with the convenience, certainty, and definiteness in having one set of rules governing the rights of all parties to government paper, as contrasted to multiple rules. If the rule of the *Clearfield Trust* case is to be abandoned as to some parties, it should be abandoned as to all and we should start afresh on this problem.